

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

MEIJER, INC. and MEIJER)
DISTRIBUTION, INC.,) Civil Action
) 08-CV-2431
)

Plaintiff,)
)

v.)
)

BIOVAIL CORPORATION, et al.)
)

Defendants.)

)

PLUMBERS AND PIPEFITTERS LOCAL) 08-CV-2433
572 HEALTH AND WELFARE FUND,)
)

Plaintiff,)
)

v.)
)

BIOVAIL CORPORATION, et al.,)
)

Defendants.)

)

ROCHESTER DRUG CO-OPERATIVE,) 08-CV-2462
INC.,)
)

Plaintiff,)
)

v.)
)

BIOVAIL CORPORATION, et al.,)
)

Defendants.)

)

AMERICAN SALES COMPANY, INC.,) 08-CV-2462
) Philadelphia, PA

Plaintiff,) August 4, 2009
)

v.)
)

BIOVAIL CORPORATION, et al.,)
)

Defendants.)

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE MARY A. McLAUGHLIN
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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Appearances: Continued

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2 COURTROOM DEPUTY: All rise.

3 THE COURT: Good morning, everyone.

4 MR. RODA: Good morning, Your Honor.

5 MR. SOBOL: Good morning, Your Honor

6 MR. KOHN: Good morning, Your Honor.

MR. COHEN: Good morning, Your Honor.

8 MR. ROYALL: Good morning, Your Honor.

9 MS. TESSAR: Good morning, Your Honor.

10 MR. STADNICK: GOOD MORNING, YOUR HONOR.
11 THE COURT: Please be seated. Well it's nice to see
12 you all again. I guess most of you I've seen before. Shall we
13 start with having everyone introduce themselves, if you don't
14 mind. Let's start with counsel for the plaintiffs. Where are
15 we going to start?

16 MR. RODA: Joseph Roda, Your Honor, for the
17 plaintiff.

18 THE COURT: Of course. How are you, sir? Let me
19 just get you on the list. Are you in order, or no? Maybe not.
20 Who are you, sir?

21 MR. SOBOL: Good morning, Your Honor. Tom Sobol --
22 S-O-B-O-L --

23 THE COURT: Okay.

24 MR. SOBOL: -- for the Direct Purchaser also.

25 THE COURT: All right, hold on for one second.

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1 You're Mr. Sobol. Yes, ma'am?

2 MS. NUSSBAUM: Linda Nussbaum, Your Honor, for the
3 Direct Purchaser Plaintiffs.

4 THE COURT: Linda Nussbaum?

5 MS. NUSSBAUM: Yes.

6 THE COURT: Yes, okay.

7 MS. NUSSBAUM: Thank you.

8 THE COURT: I'm just putting you in order according
9 to the way you're sitting. Yes?

10 MR. ZYLSTRA: Good morning, Your Honor. Kendall
11 Zylstra, Faruqi and Faruqi, for the Indirect Class --

12 THE COURT: Okay.

13 MR. ZYLSTRA: -- and I guess there's some question
14 about whether and to what extent we're invited, but I'm here at
15 the Court's --

16 THE COURT: Oh, well you're certainly invited,
17 certainly invited.

18 MR. ZYLSTRA: Thank you.

19 THE COURT: All right, so it's Mr. Roda, Mr. Sobol,
20 Ms. Nussbaum, and Mr. -- say your last name again?

21 MR. ZYLSTRA: Zylstra.

22 THE COURT: Zylstra.

23 MR. ZYLSTRA: Yes, ma'am.

24 THE COURT: Okay. And over here for -- and oh, I
25 have a lot of names here. Why don't we just have people in the

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1 back -- at least those who signed the list -- or anybody, stand
2 up, let me see who is everybody is.

3 MR. RADICE: John Radice, Your Honor, on behalf of
4 the Direct Purchaser Class.

5 THE COURT: Okay, so this is -- all of you are the
6 plaintiff's counsel in back?

7 UNIDENTIFIED COUNSEL: Yes.

8 THE COURT: Okay. Yes? Yes, sir?

9 MR. KOHN: My name is Peter Kohn, Berger and
10 Montague, also for the Direct Purchaser.

11 THE COURT: All right. Let me ask you this.

12 Everyone who's going to be speaking, are they all at counsel
13 table, or might other people -- they're not?

14 MR. KOHN: I may be speaking, Your Honor.

15 THE COURT: You may be, well I'm happy to have you.
16 I just wanted to know. Okay, that's fine. Whenever people are
17 speaking, would you mind just stating your name for the record?
18 All right, so I got this gentleman who is Mr. Kohn. And yes,
19 sir?

20 MR. COHEN: Good morning, Your Honor. David Cohen
21 from Saltz Mongeluzzi for the Indirect Purchaser Class.

22 THE COURT: Okay, nice to see you.

23 MS. NESBITT: Good morning, Your Honor. Amber
24 Nesbitt of Wexler Wallace for the Indirect Purchaser Class.

25 THE COURT: Thank you.

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1 MR. CONNOLLY: Good morning, Your Honor. Steve
2 Connolly with Faruqi and Faruqi for the Indirect Purchaser
3 Class.

4 THE COURT: Okay, thank you. Are there any other
5 lawyers in the back? No? Yes, sir? Okay, over here on the
6 defense side.

7 MR. ROYALL: Good morning, Your Honor.

8 THE COURT: Good morning, sir.

9 MR. ROYALL: Sean Royall from Gibson, Dunn and
10 Crutcher. I'm here on behalf of Biovail.

11 THE COURT: All right, nice to see you.

12 MS. TESSAR: Good morning. Amanda Tessar, also from
13 Gibson, Dunn and Crutcher on behalf of Biovail.

14 THE COURT: Thank you.

15 MR. ZEMAITIS: Thomas Zemaitis, Pepper Hamilton for
16 Biovail.

17 THE COURT: Thank you very much. So you're in order,
18 okay. This is easy.

19 MR. ROGERS: Good morning, Your Honor. Ed Rogers of
20 Ballard Spahr for the Glaxo SmithKline defendants.

21 THE COURT: Okay.

22 MR. STADNICK: Good morning, Your Honor.

23 THE COURT: Good morning.

24 MR. STADNICK: Michael Stadnick from Kirkland and
25 Ellis for the SK defendants.

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1 THE COURT: Is it Stadnick?

2 MR. STADNICK: Stadnick, yes.

3 THE COURT: S-T-A-D --

4 MR. STADNICK: N-I-C-K.

5 THE COURT: Okay, S-T-A-D-N-I-C-K, that's fine.

6 MR. PARK: And good morning, Your Honor.

7 THE COURT: Good morning.

8 MR. PARK: Chong Park with Kirkland and Ellis for GSK
9 defendants, Your Honor.

10 THE COURT: Okay. Mr. Park?

11 MR. PARK: Yes.

12 THE COURT: Okay. Thank you very much. All right,
13 everyone, I thought as an agenda we might just go through the
14 report that I received from you all, the joint Rule 26(f)
15 Report, starting with confidentiality of documents. As I
16 understand it, both sides agree to the confidentiality order
17 that was presented to me, correct?

18 UNIDENTIFIED COUNSEL: Correct, Your Honor. 10:31:38

19 THE COURT: Okay. So I have gone through it and I
20 will -- I take it you want me to sign that and I will sign that
21 order. Okay, so that's that. That was an easy one. Now the
22 timing of class and merits discovery, and I know there is a
23 dispute between the plaintiffs and the defendants on this, and
24 I guess I'd like to hear some discussion about it.

25 You know, in the old days, as I call them, when

Sobol - Argument

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1 plaintiffs would have to file their class motion real quickly
2 -- you know, fast, it would be rather pro forma and then their
3 reply brief would be the main brief. But here, I know
4 everyone's proposing that the class motion be filed -- I guess
5 it's in -- now I'm forgetting, what's the date you're giving me
6 -- December, is it?

7 MR. SOBOL: December 14th.

8 THE COURT: December 14th, all right, which I guess
9 by that time I assume there will have been some discovery
10 taken, if not all of the necessary class discovery and so that
11 will be done on December 14th. And then as I understand it,
12 the defendants want to continue with class discovery until they
13 file their opposition brief, is that correct?

14 UNIDENTIFIED COUNSEL: Yes, Your Honor. 10:32:53

15 THE COURT: Okay. But as I understand it -- forgive
16 me, sir -- this is Mr. Sobol -- Mr. Sobol, you want to continue
17 with class discovery indefinitely, is that correct?

18 MR. SOBOL: No, Your Honor.

19 THE COURT: I mean to the end of merits discovery,
20 not indefinitely.

21 MR. SOBOL: That's correct, although I think what we
22 do is -- I think the issue between the parties is a little bit
23 of a tempest in the teapot, but before I get to the tempest in
24 the teapot, let me take a step back to address your broader
25 question about the standards for rule certification and why we

1 see this as somewhat more interwoven than historically may
2 have been the case. As Your Honor is well aware, there are
3 standards for class certification being enunciated in a
4 variety of circuits, including this circuit, which require at
5 least the level of exposition by the Court as well as the
6 parties to be more detailed than it has been historically.

7 In an anti-trust case like this one, that comes into
8 play in at least two material respects. First, the impact of
9 the alleged anti-trust violation broadly upon the class, which
10 is a factual issue that gets tested throughout the discovery
11 stages. And then second, also the ability to prove damages on
12 a class-wide basis, which itself might also go throughout the
13 history of fact discovery.

14 Those two issues of impact and damages, to be sure,
15 there will be we hope -- the plaintiffs hope -- substantial
16 discovery prior to the time that we file our brief, which we
17 anticipate would address all of the issues that under this new
18 heightened standard, impact and fully damages.

19 We would expect though that because December is
20 rolling -- coming around the corner, just like it's August
21 already -- I think we're all pretty surprised it's August,
22 2009 already -- when December, 2009 comes along, we'll also be
23 surprised how quickly that came around, that there's a
24 likelihood that there may be things that the defendant raises
25 in its opposition brief or that did not come to light during

1 discovery on impact and damages that might be material to
2 raise, not by way of sandbagging, but simply by way of good
3 faith -- this is what came up on, or this is what you decided
4 after the fact.

5 The defendants I think want a hard and fast rule that
6 when we file our reply brief there's certain information
7 that's not fair game for us to be sticking in there, and that
8 we should make that decision now, for sure, as a -- you know,
9 a line in the sand, rather than looking at it essentially for
10 good cause shown at that time later on.

11 And that's really I think -- I think that issue in
12 terms of as a tempest in the teapot, but I do think that the
13 parties and the Court ought to be aware that their class
14 certification nowadays is a highly -- fact driven in the sense
15 that it requires on the part of the litigants and the Court a
16 significant exposition as to why it is that the requirements
17 are met in the way that have not historically been the case.

18 THE COURT: Yes, no, no, no, I'm familiar with
19 Hydrogen Peroxide and all of those cases. But I guess my
20 question to you was though, Mr. Sobol, putting aside for the
21 moment whether assuming we're going to stop -- if the
22 defendants succeed in their argument that at some point class
23 discovery should stop -- I understand your point, well, but
24 you want it to continue past the filing of the defendant's
25 opposition because something may come up and you may need to

1 do some additional discovery on it, and I can understand that
2 and I'll hear from Mr. Royall on it.

3 But I guess my question to you is why do you need to
4 continue with class discovery once all of the briefing is done
5 on the class cert motion?

6 MR. SOBOL: Sure. That would not be necessary under
7 the banner of class certification discovery, but there's no
8 issue that we wouldn't be discovering in any event, like
9 impact or damages, that will continue. To put it differently,
10 if there's a -- if there's an order that says the plaintiff's
11 are not permitted to do class certification discovery after a
12 certain point, the question is well what would that -- what
13 would that exclude --

14 THE COURT: No, I agree --

15 MR. SOBOL: -- by way of discovery, and I think
16 the --

17 THE COURT: -- and that's why the whole --

18 MR. SOBOL: -- and I think the answer to that will be
19 pretty much it doesn't -- I'm sorry, I didn't mean to
20 interrupt you, Your Honor -- I just -- I think that it's a
21 null set. It doesn't exclude anything because you still have
22 the issues of impact and damages that survive, which are the
23 critical class certification issues anyway.

24 But, they're also liability issues. So, those will
25 continue, therefore it's a null set to say no more class

Royal - Argument

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1 certification discovery. It doesn't exclude anything is my
2 point.

3 THE COURT: Well, it may or may not. I don't know.
4 Mr. Royall, what my question -- what I'm trying to get at is
5 in view of the fact that you have conceded as I understand it
6 that you don't want to have it bifurcated, and of course it's
7 very difficult often.

8 I mean, when -- and again, in the old days when we
9 used to have well, we're going to do class discovery now and
10 not merits, it was just always on the telephone -- what's
11 class, what's merits, so I'm delighted that you're not going
12 to try to make that argument that you want to bifurcate.

13 But putting that a little further, is there really
14 going to be a lot of discovery that will be purely class that
15 you think should end, or -- you know, is Mr. Sobol correct
16 that really it's -- it's just all discovery so why make a
17 ruling that it's going to end at any given time?

18 MR. ROYALL: Well, thank you, Your Honor. I'm not
19 sure I understand Mr. Sobol's argument, to be honest. It
20 seems to me that yes, this is a fact based inquiry, as is true
21 of summary judgment and many other types of motions and but in
22 that context as well, it's important to have a record and some
23 finality so we understand that we have a body of -- of
24 evidence to draw from and that we can present and make
25 arguments to the Court.

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1 As in summary judgment, it seems to me that this
2 should be no different and that there should be a cutoff so
3 that we can get what discovery is needed. I do think that
4 there is some discovery that is probably uniquely relevant to
5 class certification that both sides will want to do and I
6 think it's --

7 THE COURT: Can you give me an example?

8 MR. ROYALL: I think there will be discovery relating
9 to distribution issues that may -- I'm not saying it won't
10 have relevance to -- to other issues in the case, liability
11 issues, but it will be relevant to class cert.

12 There will be disparate or the typicality of
13 arguments that are being made on behalf of the class and the
14 adequacy of class representative -- just the normal class
15 certification type issues where there may be some unique
16 discovery that will need to be done relating to that.

17 Having class cert discovery close so that we have a
18 final record by no means prejudices the plaintiffs or either
19 side from continuing to do fact discovery relating to the --
20 the merits.

21 THE COURT: Well but suppose in your opposition brief
22 you make a presentation, and I'm sure that with this quality
23 of plaintiff's counsel they will be foreseeing exactly what
24 you're going to be doing pretty much, but suppose something
25 pops up that perhaps they didn't expect and so they need to do

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1 some fact discovery on it. As long as you're not prejudiced
2 in terms of being able to respond to it perhaps or something,
3 is there any reason why they shouldn't be able to do it?

4 MR. ROYALL: Is this -- would this -- is your
5 hypothetical after the close of briefing or --

6 THE COURT: No, no, no -- well, it's after your
7 brief, after your opposition brief --

8 MR. ROYALL: After our brief?

9 THE COURT: -- before their reply brief.

10 MR. ROYALL: As long as we're not prejudiced, I don't
11 think I can say that that's something that we would have
12 reason to complain of, but it could prolong -- it could cause
13 -- it could create a situation where we feel like the only way
14 that we are not prejudiced is if we have an opportunity to
15 file some sort of sir opposition or additional supplement to
16 our opposition to deal with new issues that have been raised
17 that were not raised in their motion or new facts that had
18 been developed.

19 And so it could get complicated in that sense and so
20 I think just from the simple standpoint of just trying to have
21 a finite record and trying to be as streamlined as possible
22 with the process, that's really what we had in mind. But if
23 there are unique situations that come up and obviously we will
24 not oppose any reasonable requests for supplemental discovery
25 if we're not going to be prejudiced and then I don't think

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1 that there's anything that could preclude plaintiffs from
2 seeking that if there was a good justification for it.

3 THE COURT: Mr. Sobol, let me ask you, if I were to
4 say let's aim for class discovery ending -- let me refresh
5 myself on what these dates are -- that class discovery will
6 end a week before whatever the date is that I pick for the
7 defendant's opposition, however, if in seeing the defendant's
8 opposition the plaintiffs feel that they need certain
9 additional discovery, they should discuss it with the
10 defendants.

11 If the defendants have a problem, just write me a
12 letter and if I believe that you do need it, then you'll get
13 it, and if the defendants then need a little something more in
14 terms of just responding to that one point, that -- you know,
15 I would allow them to do the same thing. Would that solve
16 whatever the concern you have is?

17 MR. SOBOL: I think it would.

18 THE COURT: Okay.

19 MR. SOBOL: I think it would. I mean, I think there
20 are two situations that might arise. One is the defendants
21 raise an issue which we hadn't anticipated -- I would hope
22 that that wouldn't be the case. The second issue might be
23 that just in the course of discovery, the parties learn about
24 something that they hadn't appreciated before reasonably.

25 THE COURT: Yes, that's true, sure.

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1 MR. SOBOL: But so -- yeah.

2 THE COURT: Sure, yes, because if discovery is going
3 to end a week before the defendant's brief, then something
4 could happen that last week and you need to do something more
5 on it. Yes, I think all of -- not all of these issues, but a
6 lot of these issues can be dealt with as long as people are
7 reasonable and talking to each other.

8 And I'm always here. You can just -- you don't have
9 to file a motion, you can just drop me a letter. And if
10 there's an issue, that's what I'm tending to do. I mean, I'm
11 still though thinking that I hope we don't have a lot of
12 battles later on what's class and what's merits because -- you
13 know, sometimes you just spin your wheels so much on that
14 point.

15 That's why I asked you what would it be, because I
16 was trying to think of what there might be two months after my
17 decision on class cert, assuming facts -- fact discovery is
18 still going on, that somebody would -- that you would need,
19 Mr. Sobol, what discovery that is really purely class, you
20 would need after for example oral argument on the class cert
21 motion.

22 I can't imagine that there would be any because if I
23 do grant the motion for class cert, you'd like the whole thing
24 to be quiet. You don't want any motions to decertify or
25 anything. If I deny it, I deny it. I mean -- you know, so

Tessar - Argument

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1 I'm not sure why we would need purely class discovery. Okay,
2 well in principle then we still have to talk about dates, we
3 still have to talk about dates. In principle, that's what
4 we'll do. And I didn't mean to ignore GSK. Who's speaking
5 for GSK?

6 MR. STADNICK: Mike Stadnick, Your Honor.

7 THE COURT: Okay, sir. Mr. Stadnick, did you have
8 any objection to that?

9 MR. STADNICK: No, Your Honor. I think that the
10 resolution you arrived at is perfectly acceptable to GSK.

11 THE COURT: Okay. Thank you very much. All right,
12 so that's the class versus merits discovery. Then we have
13 requested initial disclosures. I know we were going to meet
14 in June. Have the defendants filed their opposition -- not
15 opposition -- their response to Rule 34 -- to the Rule 34
16 requests?

17 MS. TESSAR: Yes, Your Honor, we have.

18 THE COURT: Okay. So you were saying let's at least
19 wait for that. Now, did you not object to anything and you're
20 going to give them all the documents?

21 MS. TESSAR: Well, not quite --

22 THE COURT: That was just a joke --

23 MS. TESSAR: -- because they did ask for quite a
24 broad scope.

25 THE COURT: -- if you don't know me, I should smile

Tessar - Argument

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1 because I -- people might think I'm -- I'm just joking in a
2 case like this. In fact, in a little case there's never a
3 time when one party says sure, here, take it. But I'm sorry,
4 ma'am, go ahead, tell me, where are you?

5 MS. TESSAR: Well, I mean, obviously their request
6 for production, there were something like 75 of them that
7 spanned a huge range of documents. I think that the
8 plaintiffs -- I'll let them speak for themselves -- but I
9 think their most pressing concern in the underlying litigation
10 record documents --

11 THE COURT: Sure.

12 MS. TESSAR: -- and that's the dispute that's framed
13 in these papers -- the Rule 26(f) Report. And the issue from
14 our perspective is really one of the complexity of the record.
15 I'm not sure how familiar you are with it, but their -- the
16 plaintiff's allegations here relate to something like five
17 litigations that started in 2004. The last one ended last
18 year in 2008. There were multiple law firms involved for
19 Biovail.

20 GSK was involved in many of the suits and had law
21 firms involved and the requests for the underlying litigation
22 documents implicate a lot -- a lot of materials that are third
23 party -- have third party confidential information.

24 THE COURT: Right.

25 MS. TESSAR: So obviously, in each of the underlying

Kohn - Argument

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1 cases, there were protective orders in place and those
2 protective orders limited who at Biovail could see materials
3 and what outside counsel and in house counsel could do with
4 the materials so they could only be used for purposes of those
5 cases, they could -- you know, not be produced necessarily
6 just because in a separate case someone made a document
7 request.

8 So where we are at right now is Biovail has notified
9 all of the generic companies that were defendants in the
10 underlying lawsuits that these materials have been requested,
11 have asked for consent to produce the materials, and the
12 generic companies that have responded to us have all refused
13 that consent.

14 And so as things stand now, we cannot give the
15 plaintiffs the materials they request or the majority of the
16 materials they request without violating separate protective
17 orders.

18 THE COURT: Okay. Okay, let me -- yes, sir, and
19 don't tell me, don't tell me who you are, I'm going to get it.
20 You are -- wait a minute -- Mr. Kohn.

21 MR. KOHN: Yes, Your Honor.

22 THE COURT: Oh, good.

23 MR. KOHN: I am Mr. Kohn.

24 THE COURT: Okay, go ahead.

25 MR. KOHN: For the Direct Purchaser Plaintiffs. Your

1 Honor, I was listening to Ms. Tessar's recitation of events
2 and I'm -- we're gratified to learn that Biovail and I presume
3 GSK have put the producing parties in those cases on notice
4 because they are required to by the protective orders that
5 were entered in those four cases, and those protective orders
6 are attached as Exhibits B-1 through 4 to the 26(f) Report,
7 and I'll get into those in just a moment.

8 The -- there's no dispute that I heard that Biovail
9 and GSK have the documents or have access to the documents
10 that we have requested in our Rule 34 requests and I've heard
11 no issue that we have served our requests improperly. What
12 I've heard is that although they followed the procedures and
13 notified the generics, there's somehow some impediment to
14 their producing these materials.

15 And we have been through the four protective orders
16 in the underlying cases and we can see no impediment. And in
17 fact, Your Honor, if Your Honor wants to turn to those -- or I
18 have a demonstrative that's very simple that will point Your
19 Honor --

20 THE COURT: Sure, go ahead.

21 MR. KOHN: May I approach?

22 THE COURT: Sure, absolutely. Yes, and you can --
23 why don't you just go stand at the podium, Mr. Kohn?

24 MR. KOHN: Sure.

25 THE COURT: Thank you.

1 MR. KOHN: I have extracted, Your Honor, the
2 pertinent provisions of protective orders and I'll let Your
3 Honor know preliminarily that we have entered a protective
4 order in this case and if you look at -- I think Your Honor
5 has stated her intent to sign it --

6 THE COURT: Right.

7 MR. KOHN: -- if you look at paragraph 3-D of the
8 proposed protective order in this case, it already
9 contemplates the production of the materials in the underlying
10 patent litigations in this case. In fact, counsel for Biovail
11 suggested paragraph 3-D.

12 So, everything that will be produced from the
13 underlying patent litigations in this case will be highly
14 confidential. Now, let's take a look at the underlying
15 protective orders in the patent cases. There's no consent
16 provision. Biovail and GSK simply have to, as they say they
17 did, give notice to the producing parties.

18 And then you'll see later in the first paragraph --
19 paragraph 5 of the Abrika -- A-B-R-I-K-A protective order, "It
20 shall be the responsibility of the party who produced the
21 confidential material to intervene and respond," meaning that
22 they come to Your Honor if they have an objection, and
23 obviously they do not because there has been a notification of
24 these parties by Biovail and by GSK and there has been no
25 action before Your Honor.

1 THE COURT: Well, let's just find out what's going
2 on. Is it Ms. Tessar?

3 MR. STADNICK: Your Honor, if I could speak on behalf
4 of GSK?

5 THE COURT: Absolutely, absolutely. I just want to
6 make sure I have Ms. Tessar -- yes, go ahead, Mr. Stadnick, go
7 ahead.

8 MR. STADNICK: I just need to correct something that
9 Mr. Kohn said.

10 THE COURT: Yes.

11 MR. STADNICK: GSK is in fact slightly differently
12 situated than Biovail is in this regard and to the extent that
13 Mr. Kohn is making the assumption that GSK has these documents
14 and has made requests for the production, I'm not sure that's
15 accurate.

16 As Your Honor may recall, GSK's participation in the
17 underlying patent litigations was very limited. We're not a
18 signator to the underlying protective orders with exception to
19 the Watson protective order, and my understanding based on
20 investigation to date is our participation in discovery in the
21 underlying patent litigations was strictly on the producing
22 side.

23 So to the extent that we have documents related to
24 the underlying litigation, there's documents that we collected
25 and produced, I'm not sure that we have any documents that

1 would raise their party confidentiality concerns. I just want
2 to make sure that the record is clear that by being silent,
3 I'm not acceding to your implication that we have these
4 documents and --

5 MR. KOHN: In that event, Your Honor, we'd expect
6 prompt production of the documents from GSK.

7 THE COURT: Well --

8 MR. STADNICK: We are in the process of --

9 THE COURT: Yes?

10 MR. STADNICK: The issue from GSK's perspective to be
11 frank, Your Honor, has been more a logistical issue of
12 tracking down the attorneys who represented GSK --

13 THE COURT: Right.

14 MR. STADNICK: -- in the former litigation who aren't
15 parties to this case, who are former counsel for GSK, many of
16 whom have left the law firms at which they resided when they
17 were representing GSK so it's been a bit of a logistical
18 problem in tracking down the documents. We're in the process
19 of doing that and hope to be able to start producing them in
20 the next couple of weeks.

21 THE COURT: Okay. All right. And, Ms. Tessar, now
22 I'm looking at this piece of paper that Mr. Kohn just gave me
23 and what is your understanding of what should go on here?
24 You've given them prompt actual written notice by hand or
25 facsimile. They have told you that they object --

Tessar - Argument

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1 MS. TESSAR: So hold on a little bit because first of
2 all, I want to take a step back and address something that Mr.
3 Kohn said because he said that there's no dispute that Biovail
4 has the documents and I think the use of the word Biovail
5 there is a little bit confusing because outside counsel in the
6 patent litigations has the confidential documents.

7 In some cases, the generic companies have consented
8 that anti-trust outside counsel can have them, but in many
9 cases, they have not. And so, in fact, when you say Biovail
10 has them, the outside former -- outside patent counsel has
11 them.

12 THE COURT: No, I understand that and I'm sure Mr.
13 Kohn says that too but you have -- but Biovail has the right
14 to get them because it's their outside counsel.

15 MS. TESSAR: Okay.

16 THE COURT: That's what --

17 MS. TESSAR: So then moving on --

18 THE COURT: That's what he means.

19 MS. TESSAR: -- moving onto the protective orders,
20 each of the protective orders is different --

21 THE COURT: Okay.

22 MS. TESSAR: -- so what's happened in each --
23 obviously each defendant from the underlying cases is
24 different, so what's happened in each case is a little bit
25 different. So if we're to walk through, the first two

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1 paragraphs listed here are actually very similar. Those are
2 from the Abrika and Watson protective orders, so we have given
3 Abrika and Watson notice. Abrika did not respond but we've
4 made previous attempts to contact Abrika so that we -- outside
5 anti-trust counsel -- could access the documents in question
6 and they refused in the past. So as things stand now, we at
7 Gibson Dunn cannot access those documents.

8 THE COURT: No, I understand that. But the question
9 is, you've given Abrika -- if that's how you say their name --
10 prompt actual written notice. What is your understanding that
11 they have to do under this because it does say, as Mr. Kohn
12 said, "responsibility of the party who produced the
13 confidential material to intervene and respond." It doesn't
14 say when though. Usually it says within a certain amount of
15 days, these things, don't they?

16 MR. KOHN: This actually did not provide for that.
17 Biovail and Abrika were parties to this particular protective
18 order --

19 THE COURT: No, I know.

20 MR. KOHN: -- and in fact, they drafted it.

21 THE COURT: Yes.

22 MR. KOHN: And because their has been and I don't
23 know when --

24 THE COURT: Yes.

25 MR. KOHN: -- notice was given -- maybe Ms. Tessar

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1 can inform the Court of that --

2 THE COURT: Right.

3 MR. KOHN: -- but given that there has been no
4 intervention or objection by Abrika before this Court within
5 the meaning of paragraph five of this protective order,
6 there's no impediment to Biovail for producing those
7 documents, would be our position.

8 THE COURT: I understand, Mr. Kohn, but -- you know,
9 I'm not going to say give it -- are they out there, give it to
10 them right now. We're not going to do that. But I just want
11 to understand, Ms. Tessar, what -- what is your understanding
12 with respect to Abrika, just taking Abrika for a moment.

13 Because looking at this, it doesn't say when they're
14 supposed to come in. Have they told you they're going to come
15 in? I mean, if they're going to come in, obviously I will let
16 them come in at some point. Do you know what they want to do?

17 MS. TESSAR: We do not.

18 THE COURT: Okay.

19 MS. TESSAR: And that's kind of the dilemma from our
20 perspective because we still have the other protective order
21 binding Biovail and so at this point it becomes a little bit
22 of a rock in a hard place.

23 THE COURT: What's the other one? You mean this one
24 with Abrika?

25 MS. TESSAR: Exactly.

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1 THE COURT: Yes. No, no, no, I understand, but what
2 it says is "If any party is subpoenaed, is served with a
3 demand to which it is a party," okay -- and that's you, right,
4 Biovail, "that shall give prompt actual written notice to
5 those who produced or designated the information material,
6 confidential," et cetera, and that is Abrika --

7 MS. TESSAR: Yes.

8 THE COURT: -- "and shall object to its production by
9 setting forth the existence of this protective order," and
10 you've done all that.

11 MS. TESSAR: That's correct.

12 THE COURT: Okay. "Should the person seeking access
13 to the information or material" -- "should the person seeking
14 access to this information" -- that's you I guess, Mr. Kohn --

15 MR. KOHN: Yes, Your Honor.

16 THE COURT: -- "take action against the party or
17 anyone else covered by this protective order to enforce, it
18 shall be" -- oh, well you haven't done that yet so I guess
19 that means you have to do a motion to compel or something.

20 MR. KOHN: Your Honor, it was our hope that by
21 pressing Biovail for these documents we would be complying
22 with that paragraph and by appearing before Your Honor and
23 insisting on that production, and in doing so in the context
24 of the 26(f) Report, we would have complied with that. But if
25 Your Honor wants us to file a Rule 37 motion, we believe one

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1 is ripe and would do so forthwith.

2 THE COURT: Yes, yes, sure. Well see I think that's
3 what triggers this so as I -- it doesn't say should -- well,
4 it says "Should the person seeking access to this information"
5 -- blah, blah, blah, blah, blah -- "take action against the
6 party" -- that's Biovail -- "to enforce the demand, then it
7 shall be the responsibility of the party who produced to
8 intervene and respond."

9 You haven't done that yet. I assume when you do
10 that, Ms. Tessar will ship that motion to compel over to
11 Abrika and they will have to intervene if they want to object.

12 MS. TESSAR: And I would actually propose that the
13 plaintiffs serve Abrika because we really do see this as being
14 a dispute between the plaintiffs and Abrika so that would be
15 my suggestion.

16 THE COURT: Sure, okay, well that's no harm.

17 MR. KOHN: Your Honor --

18 THE COURT: Yes.

19 MR. KOHN: -- this is our Rule 34 requests that are
20 served --

21 THE COURT: Right.

22 MR. KOHN: -- to Biovail and although we're happy to
23 do anything that makes it easier --

24 THE COURT: Right.

25 MR. KOHN: -- for the Court and the parties, there

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1 could be third parties that Ms. Tessar has not referenced that
2 were producing parties in the case that Biovail brought
3 against Abrika. We don't know who --

4 THE COURT: Right.

5 MR. KOHN: -- those entities are. Biovail has never
6 seen fit to inform us --

7 THE COURT: Right.

8 MR. KOHN: -- who the producing parties are --

9 THE COURT: Okay, well clearly if -- look, I don't
10 mean to cut you off but honestly, this is a practical problem.
11 We can get through this. This is not -- you know, obviously
12 you're going to get the documents. At some point under some
13 circumstances, you're going to have to get them.

14 So the question is what's the simplest way to do it
15 within the confines of this, and in fairness to Abrika, they
16 haven't been served with something that triggers to them that
17 they need to come in. So go ahead, Ms. Tessar.

18 MS. TESSAR: And I was just going to say that the
19 same -- because the provision in paragraph five of the Watson
20 protective order is so similar, that I assume we'd take the
21 same approach for Watson.

22 THE COURT: Yes. I haven't -- I haven't looked at it
23 carefully but if it says the same thing, that seems to me to
24 be -- now, "It shall be the responsibility of the party who
25 produced the confidential material to intervene and respond."

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1 So I infer from that that if there's a motion to compel,
2 there's a certain time period for motions and that Abrika will
3 understand that they're going to have to come in, even if Ms.
4 Tessar doesn't tell them that, that they're going to have to
5 come in within the time frame of the rules, unless they ask me
6 for a continuance to intervene and respond.

7 Okay, well that's not going to be that hard. That's
8 fine. Okay, they'll come in if they want to. If they don't,
9 we'll -- you know, we'll take action. Mr. -- yes?

10 MR. KOHN: We will therefore file, Your Honor, Rule
11 37 motions as to Biovail with regard to the documents in the
12 Abrika and Watson cases. That leaves the Anchen and IMPAX
13 cases --

14 THE COURT: Okay, before you get there, sir, Mr.
15 Royall, and you didn't see him but he was standing up to
16 speak.

17 MR. KOHN: Oh, I'm sorry.

18 MR. ROYALL: That's okay.

19 THE COURT: That's okay. Go ahead.

20 MR. ROYALL: Just in response to your --

21 THE COURT: Yes.

22 MR. ROYALL: -- point, Your Honor, about whether we
23 or Ms. Tessar would advise Abrika and Watson, we certainly
24 will advise them by letter of this conference and Your Honor's
25 statements and rulings so that they'll be aware of the

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1 situation and can promptly respond.

2 THE COURT: Okay, I appreciate that. That's great.
3 Yes, and if they have a problem, obviously we're not going to
4 cut off anybody's rights prematurely. Everybody will have a
5 right to be heard before I would make any ruling. But in any
6 event, okay, Ms. Tessar, anything of Abrika and Watson before
7 I hear from Mr. Kohn Anchen?

8 MS. TESSAR: No, Your Honor.

9 THE COURT: Okay. I haven't read that one as yet.
10 Why don't you walk me through that, Mr. Kohn.

11 MR. KOHN: Your Honor, Anchen's a little bit
12 different. Anchen, paragraph 15, simply says that "Production
13 of any confidential material by" -- and there's a missing "a"
14 there -- "non-producing party is response to an apparently
15 lawful subpoena, motion or order of Court or other
16 Governmental agency shall not be deemed violation of any of
17 the terms of this order," meaning our Rule 34 request to
18 Biovail and Biovail's response to those Rule 34 requests is
19 not a violation of the terms of the underlying protective
20 order in the Anchen case.

21 However, and just like the other two orders, Biovail
22 has to notify the producing party, if there's enough time to
23 do so, and give the producing party the opportunity to secure
24 confidential treatment in this case of the documents that had
25 been produced in the underlying Anchen case.

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1 THE COURT: Okay, go ahead.

2 MR. KOHN: And I would tell Your Honor that through
3 cooperation with counsel for Biovail and counsel from GSK,
4 paragraph -- I think it's 3-D of the protective order that
5 Your Honor is expected to enter in this case affords all
6 documents in the underlying patent cases, irrespective of the
7 designation of those documents in the underlying patent cases
8 to be afforded highly confidential treatment --

9 THE COURT: Okay.

10 MR. KOHN: -- in this case.

11 THE COURT: Okay, fair enough.

12 MR. KOHN: So I -- we don't think there's any
13 impediment to Biovail's production of any of the documents,
14 irrespective of the identity of the producing party that were
15 exchanged in the Anchen case to be produced in this case.

16 THE COURT: Okay. And, Ms. Tessar, do you know what
17 the story is with Anchen?

18 MS. TESSAR: I do, Your Honor. So two points.
19 First, I don't believe that we've had a subpoena, motion or
20 order here so I don't believe that the provisions of paragraph
21 15 have kicked in.

22 But even setting that point aside, we did notify
23 Anchen of the document requests and Anchen did send us a
24 letter refusing to permit us to produce any of the documents
25 and specifically objecting to the fact that the protective

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1 order that has been stipulated to in this anti-trust case is
2 less restrictive than the protective order that was entered in
3 the Anchen case and that's mostly with respect to access by in
4 house attorneys, things of that nature.

5 THE COURT: Now, did -- all right, a couple of
6 things. Mr. Kohn, what about the apparently lawful subpoena,
7 motion or order?

8 MR. KOHN: We think that the Rule 34 requests that we
9 served in this case are the equivalent of a Rule 34 -- Rule 45
10 subpoena. It would be improper for us to serve a Rule 45
11 subpoena on Biovail --

12 THE COURT: Of course.

13 MR. KOHN: -- because they're a party.

14 THE COURT: Of course.

15 MR. KOHN: So we believe that we have complied with
16 whatever trigger is necessary and by the fact that they
17 notified and felt it appropriate to notify Anchen, I think
18 that Biovail probably wouldn't disagree. However, if the
19 Court would like us to file a Rule 37 motion against Biovail
20 as to the Anchen documents, we'll do so forthwith.

21 THE COURT: Okay. Let me read this.

22 (Pause in proceedings)

23 THE COURT: Okay, why don't you just -- well, let's
24 make it sort it easier and let's -- if we can do them all
25 uniformly without violating the order, let's do it that way.

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1 And since we have two that require a motion, why don't you do
2 a motion on Anchen as well and then I think probably what I'll
3 do is on getting -- especially with Anchen -- maybe with all
4 of them, let me think about it, but what I might do is when I
5 get your motions, do an order saying where as I've got the
6 motion, whereas I know there are these orders -- Anchen,
7 Abrika, Watson, et cetera, shall follow this procedure.

8 Okay, I think probably that might make it easier and
9 then everybody will know what the dates are so that we don't
10 have a situation where somebody's running in to have me vacate
11 an order or something. Okay, now what about IMPAX? Is that
12 any different, Mr. Kohn?

13 MR. KOHN: IMPAX, Your Honor, I think the procedure
14 Your Honor has prescribed is fine for IMPAX. IMPAX is a
15 little bit different from the other three. What I have
16 reproduced here is what I think would be an appropriate way to
17 go with regard to IMPAX. The IMPAX order doesn't provide the
18 procedure that is to be followed when there is a request by a
19 non-party such as the plaintiffs in this case to get the
20 documents from that case.

21 THE COURT: All right.

22 MR. KOHN: However, I noticed that there was this
23 paragraph 15 in the IMPAX case where in the event of an
24 inadvertent production of documents and it says "or
25 otherwise," perhaps that contemplates the situation, all the

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1 plaintiffs need to do is agree to be bound by the underlying
2 protective order in the IMPAX case, which was before Judge
3 Brody.

4 THE COURT: All right.

5 MR. KOHN: And we could go that route.

6 THE COURT: Let me get Ms. Tessar's views of it.

7 Yes, ma'am?

8 MS. TESSAR: We see this IMPAX protective order as
9 actually being the most complicated one to handle because
10 there is no express provision for how you handle these
11 situations where discovery of the documents are sought, and
12 this is kind of the first we've really heard that the
13 plaintiffs were considering this paragraph 15 --

14 THE COURT: I don't construe it to cover this --

15 MS. TESSAR: Exactly.

16 THE COURT: It's not for this. We'll have to think
17 up a different way though. Go ahead.

18 MS. TESSAR: And so I think that -- you know, in
19 order to set this up so that Biovail wouldn't be violating an
20 underlying protective order, I think realistically what has to
21 happen is that the plaintiffs have to go back to Judge Brody
22 and seek to have the protective order modified in some way in
23 that context, because otherwise Biovail is simply between the
24 rock and the hard place --

25 THE COURT: Right.

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1 MS. TESSAR: -- of Judge Brody's orders and yours.

2 THE COURT: Is there any objection to my asking Judge
3 Brody, assuming that I get a Rule 37 motion on this, I can ask
4 Judge Brody to -- let me think about what the terminology
5 would be but to -- you know, issue an order telling them --
6 them being IMPAX, to come in and let her know if there's any
7 objection to her modifying the order to -- so that they can be
8 produced. Does that make sense, Ms. Tessar?

9 MS. TESSAR: Yeah.

10 THE COURT: Okay.

11 MS. TESSAR: We have no objection to any of that.

12 THE COURT: Okay.

13 MS. TESSAR: Also, I mean, I would just note for the
14 record that in past cases that we've handled of this nature,
15 the plaintiffs have gone to the generic companies and sought
16 consent and sometimes got them, and so that may be a simpler
17 way to proceed, and sometimes they're more able to convince
18 the generic companies to consent than we at Biovail are.

19 THE COURT: That's a fair point, but I assume Mr.
20 Kohn knows that already and maybe he doesn't want to or tried
21 and they said no.

22 MR. KOHN: Well -- you know, we haven't actually
23 tried and there's one reason that we haven't tried and I think
24 Ms. Tessar has let you know that at least one of the companies
25 has said that they would refuse --

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1 THE COURT: But maybe you could convince them is what
2 she's saying.

3 MR. KOHN: In my experience --

4 THE COURT: Maybe they'll like you better --

5 MR. KOHN: Well, that hasn't --

6 THE COURT: -- than they like Biovail.

7 MR. KOHN: -- that hasn't been --

8 THE COURT: Not that Ms. Tessar -- I didn't mean you
9 personally, I meant --

10 MR. KOHN: That has not been my experience and --

11 THE COURT: Okay, well we can do it this way. I'm
12 not going to --

13 MR. KOHN: Yes.

14 THE COURT: -- I'm not going to pressure you to do
15 that. I mean, I'm sure you want to get the job done as
16 quickly as possible, so if you thought it was productive or
17 would be productive you would do it. So I won't press that.
18 They obviously feel they -- that that's not a route to go.

19 Yes, Mr. Stadnick?

20 MR. STADNICK: Thank you, Your Honor. I just would
21 like to point out that in connection particularly with any
22 modification of the IMPAX protective order, it would also have
23 to be modified so that GSK could have access to the documents
24 as well since we don't have the productions and we'll have to
25 work with plaintiff's counsel and the counsel for Biovail to

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1 figure out how to get copies of the other productions also as
2 well.

3 THE COURT: Oh sure, yes, well I mean all the parties
4 will of course have to have access to everything, yes,
5 absolutely. Okay. Ms. Tessar, anything else on just this
6 issue of the prior lawsuits and how we can set forth -- you
7 know, get in place a procedure at least to get things moving?

8 MS. TESSAR: Nothing further from me, Your Honor.

9 THE COURT: Okay, all right. Now, that's the -- that
10 was one of your main problems on the Rule 34 production.
11 Otherwise, I assume that you all -- is there a committee on
12 this plaintiff's side or something to work -- who's working
13 with Biovail and GSK to negotiate discovery disputes?

14 MR. SOBOL: Well, we have a group on our side and
15 they have a group on theirs.

16 THE COURT: Okay, all right, that's fine. So I
17 assume with respect to everything else, and I don't know how
18 much there is that's not impacted by these agreements, you'll
19 just work it through as you always do and I assume you'll be
20 able to work things through.

21 And once, assuming -- again, I'm assuming -- I'm
22 completely open to any argument obviously that IMPAX, Anchen,
23 et cetera, will make to me but assuming for the moment that
24 those materials do get produced, in terms of timing and the
25 like, I expect that everybody will work together so that --

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1 you know, and at this point I don't want to say anything about
2 what timing is because we don't even know as yet what will be
3 going on. Okay, so that's that.

4 Now, is there anything else then on this topic in
5 your report that's entitled -- where is it, what's the title
6 -- Requested Initial Disclosures -- anything more on that
7 front? No?

8 MR. SOBOL: No, there isn't, Your Honor.

9 THE COURT: Okay.

10 MR. SOBOL: When we get to scheduling, we might
11 discuss briefing regarding this Rule 37 motion --

12 THE COURT: Sure.

13 MR. SOBOL: -- but let's deal that when we get to
14 scheduling.

15 THE COURT: Absolutely, absolutely. Now, bear with
16 me for one second. Okay, now the form of document production
17 -- ESI issues, that's fine, you've told me you're talking
18 about that number of requests, that's fine. You'll work
19 through that. And then this advice of counsel -- you know,
20 how does it work under PRE (Phonetic)?

21 Mr. Roda, how does advice of counsel come in? You've
22 got the two part definition of sham litigation, objectively
23 baseless, and then you've got the subjective part of it. Just
24 -- you know, educate me a little bit. How does advice of
25 counsel come in in this?

Roda - Argument

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1 MR. RODA: We think it comes in on both issues, Your
2 Honor. We think that if one were the defendant --

3 THE COURT: Yes.

4 MR. RODA: -- you would want the jury to know that as
5 a responsible entity, you ran the decisions to file the
6 lawsuits, to participate in the lawsuits, or to file the
7 petition before your responsible ethical counsel before you
8 did it, you didn't just do this loosely --

9 THE COURT: But will --

10 MR. RODA: -- and that counsel would not let you file
11 an unreasonable --

12 THE COURT: -- will that mean that -- right, but
13 would that mean -- you mean as evidence of the fact that it
14 was objectively reasonable --

15 MR. RODA: Yes.

16 THE COURT: -- because if counsel said it was okay,
17 then --

18 MR. RODA: We're entitled to believe it.

19 THE COURT: -- they -- the jury is entitled to
20 believe it.

21 MR. RODA: And they -- the companies were entitled to
22 take the advice of their esteemed counsel.

23 THE COURT: Even if otherwise it was objectively
24 unreasonable.

25 MR. RODA: We would present evidence -- we think that

1 that is an arrow in the quiver that they would want to
2 present.

3 THE COURT: So you're making -- okay, because
4 normally --

5 MR. RODA: The --

6 THE COURT: -- I would expect them to be telling me,
7 Judge, this is a great defense and we want to use it, but
8 you're expecting it --

9 MR. RODA: We anticipate it.

10 THE COURT: -- it comes up in these cases, is what
11 you're telling me.

12 MR. RODA: We -- Your Honor, yes, and when you think
13 about what these issues -- the case involves the decision to
14 file lawsuits, the decision to file petitions. It's very
15 reasonable to think that these were vetted by counsel and it
16 would be unreasonable to think otherwise. The question is at
17 what point they invoke the advice of counsel decision because
18 that affects all the discovery.

19 It would be very unlikely to have discovery that
20 doesn't have something that -- a decision, a consultation, a
21 conference that was made that didn't include lawyers,
22 documents that weren't circulated or copied to lawyers or
23 authored, et cetera.

24 And if they should defer the decision to invoke that
25 defense, until we've done a lot of discovery, we come into you

1 saying Your Honor, they -- that invocation waives the
2 privilege, we now have the right to go back and re-depose
3 everybody, reexplore the documents -- terribly inefficient.
4 We're talking here about the objectives of rule one -- just,
5 speedy and inexpensive determination of every action. There
6 is no reason why that decision, are they going to invoke it or
7 aren't they going to invoke it can't be made at this juncture.

8 They know what they did. It's not as if they have to
9 go into this case and find out facts that will let them make
10 the most educated decision on it. They know. The only thing
11 they don't know is how much we're going to find out about what
12 they did.

13 It is also important as a sub-issue in this, what
14 does invoking the advice of counsel mean. Of course, we say
15 it can be done two ways. One is the overt way -- we relied on
16 counsel. The other is the subtle way -- you don't say that
17 but you tell the jury, we vetted this with this group, this
18 group included our attorneys -- our very good attorneys, the
19 group said it was okay to do it.

20 THE COURT: Well, I can't imagine that I would let
21 the defendants do -- tell the jury that if they haven't given
22 you their non-privileged or their privileged materials. I
23 mean --

24 MR. RODA: That's -- Your Honor, then that addresses
25 one of our concerns in the case that ought to be clear early

1 on. I mention that because in other cases like this, this
2 issue has not been addressed early -- through no fault of the
3 Court's. It's one of these things -- it's something you live
4 and learn.

5 THE COURT: Right.

6 MR. RODA: And in the SR litigation, for example,
7 Wellbutrin SR which was before Judge Kauffman and now before
8 Judge Stengel, that issue is the subject of a motion in limine
9 as to what effect, if any, they'll be a preclusion of the
10 introduction of evidence.

11 What we're suggesting is that because the issue is
12 ripe, that it be decided now so that we can minimize and
13 indeed hopefully eliminate the need for any duplication later
14 on. And we agreed that they shouldn't be able to have it both
15 ways, tell the jury that, but not let us see the underlying
16 documents.

17 We just think that it should be decided now and we
18 think really that's in fairness to everyone, not just to us
19 but to them because they will know as they make decision along
20 the case -- along the way to invoke it or not, what the
21 consequences will be. If they know, as Your Honor just said,
22 no document, no evidence to the jury, that attorneys were
23 involved, then everybody's on the same page from the
24 beginning.

25 THE COURT: Okay.

Royal - Argument

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1 MR. RODA: We think it -- this should be established
2 now early on, rather than later on.

3 THE COURT: Mr. Royall, what is your thinking on the
4 timing? I mean, I'm not going to obviously have you do it
5 right this second, but what's your thought on what timing,
6 because we don't -- and I know you don't want to have people
7 re-deposed -- heavens, that would be --

8 MR. ROYALL: No, Your Honor, certainly if that's
9 avoidable, it's something that I think everyone would like to
10 avoid. A few thoughts on this. One is as we cited in the
11 report, there is -- there's law and support for the
12 proposition that this is something that parties should not be
13 required to do earlier at the outset of discovery --

14 THE COURT: No, I understand, and I'm not going to
15 make you do it but on this stuff -- you know, telling me about
16 the cases unless the Third Circuit or the Supreme Court has
17 said something to me --

18 MR. ROYALL: Right.

19 THE COURT: -- I really -- to me, it's practical, you
20 know, what's the practical reason for you not to do it --

21 MR. ROYALL: Well --

22 THE COURT: -- sooner rather than later --

23 MR. ROYALL: Well, one point --

24 THE COURT: Yes.

25 MR. ROYALL: -- practical reason and just to

1 elaborate a little bit on the situation which is not -- I
2 think customarily the defendants in a litigation that's been
3 going on for the time period that this litigation has would be
4 -- you know, if not fully possessed of the facts from their
5 perspective, certainly quite up to speed. We don't have that
6 situation here.

7 We have not even been permitted to review the
8 pleadings in the underlying cases because they're chocked full
9 of confidential information from the generics, who have not
10 consented to us even seeing that in most cases.

11 And so we -- we're not -- we're not much ahead of the
12 plaintiffs in terms of having the understanding of the basic
13 factual record here and obviously, this is a very important
14 decision for any party to make, whether to make a decision to
15 rely on advice of counsel potentially with the waiver of some
16 scope.

17 And so that's something that we believe that we
18 should be able to consider carefully in light of the evidence
19 as it develops, in light of our assessment of other defenses
20 that may be available. It's obviously a very significant
21 decision to make. We have -- Mr. Roda suggested that this is
22 ripe now and I think suggested that we may know now whether we
23 intend to rely on such a defense and that is absolutely not
24 the case.

25 I don't think it's ripe. I don't think we know and

1 it's something that we would have to carefully consider and
2 consult with our client with after again we know more about
3 what the facts are and what other defenses are available.

4 THE COURT: Yes. Yes, Mr. Roda, what about that? I
5 mean, he -- counsel who is -- I mean, and when you talk about
6 well they know or Biovail knows, I mean, Biovail had outside
7 counsel on those cases and it wasn't Mr. Royall, so Mr. Royall
8 himself is not in a position probably at this point to give
9 advice to his client as to whether they should invoke it in
10 this case or not.

11 Isn't that a fair point in view of the fact that he
12 hasn't really seen the underlying documents yet?

13 MR. RODA: If it is a matter of his getting up to
14 speed and if Your Honor believes that a reasonable period of
15 time for him to get up to speed is there, yes, but I wouldn't
16 think it to take that long for his client to say here's what
17 happened, here is who made these decisions, here is what the
18 lawyers told us, here's what we decided.

19 I mean, they have filed answers to this case. I
20 would think that's the kind of information that could be given
21 pretty quickly to the counsel who's going to be representing
22 them.

23 THE COURT: It's a real big strategic decision for
24 defendants. They have to look at the documents. What do the
25 documents say that they'll have to give up. I mean, we all

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1 know this -- you know, what's the whole package here of
2 decision making. They have to know what the privileged
3 documents say, what their clients say, what are the other
4 defenses, how strong are they, so we -- I mean, it is -- it's
5 not an easy decision to make, I'm sure. I mean, I've never
6 done sham litigation cases but I can't imagine it's an easy
7 decision.

8 So the question is when is it -- when should it be
9 made so that we don't have people having to be re-deposed, and
10 they're going to be, I take it, defense people who will have
11 to be re-deposed, right?

12 MR. RODA: They would be, Your Honor --

13 THE COURT: Yes.

14 MR. RODA: -- and it's not just re-deposed, but it's
15 production of more documents --

16 THE COURT: Sure, oh yes.

17 MR. RODA: -- to go in and depose them.

18 THE COURT: Absolutely.

19 MR. RODA: We really have the danger of a lot of
20 duplication.

21 THE COURT: Which I don't want to have, Mr. Royall,
22 and I don't want the plaintiffs to be -- you know, prejudiced
23 with all the extra costs and time and the like. So what are
24 you thinking, Mr. Royall? What's your -- do you have a
25 proposal to make?

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1 MR. ROYALL: Well, Your Honor, I certainly agree with
2 the comments that it is a complicated decision and we not only
3 would need to know some basic information from our client
4 about what lawyers said, we'd need to assess the case as a
5 whole before making --

6 THE COURT: Sure.

7 MR. ROYALL: -- this very consequential --

8 THE COURT: Right.

9 MR. ROYALL: -- decision. What we were thinking as a
10 proposal would be a deadline that's six weeks before the close
11 of discovery and GSK may want to speak with their views
12 because this not something that vetted specifically with them,
13 but speaking for Biovail, something on the order of six weeks
14 we believe would be reasonable because in the event that that
15 did necessitate or open up reasonable requests for further
16 discovery by plaintiffs, there would be some additional time
17 for that.

18 And of course obviously if they feel that they're
19 prejudiced and don't have the time to get it done in six
20 weeks, they could raise that with the Court or raise it with
21 us. But we think that that would be reasonable and I -- I
22 don't think that if there were -- one thing just to bear in
23 mind that we bear in mind, if there were to be a reliance on
24 advice of counsel here, it wouldn't necessarily cut across all
25 four of these cases, it wouldn't necessarily implicate every

1 witness by -- by no stretch, would it?

2 It may -- may be that a strategic decision would be
3 would be made where there's only one of the four cases say
4 potentially and there's only one lawyer or a couple of lawyers
5 who were involved. We don't know until we -- until we get
6 there and we may very well make the decision not to rely on
7 this defense.

8 But we think that not knowing how this may play out,
9 that a good starting point would be to have a deadline of six
10 weeks before the close of fact discovery.

11 THE COURT: That sounds awfully close because I take
12 it there are probably loads of documents. Well, in fact we're
13 going to get in a minute to this categorization of privilege
14 that -- you know, whether you have to list every privileged
15 document individually or whether you can do it by category.
16 It's one of the categories in your report.

17 So when you tell me you want to do it by category, I
18 take it that means there's a lot of privileged documents.
19 Now, Mr. Stadnick, did you want to speak?

20 MR. STADNICK: Yes, Your Honor. I think that there
21 may be an awful lot of privileged documents doesn't
22 necessarily bear on the scope of additional discovery that
23 might have to follow on any election --

24 THE COURT: But you have to give them the documents.

25 MR. STADNICK: Well, it depends. I mean, there's

1 going to be a litigation over what the scope of the waiver is
2 and there could be many privileged documents that don't fall
3 within the scope of whatever waiver is ultimately -- is
4 ultimately found to exist in connection with the election of
5 the defense and I think that's one of the difficulties in
6 trying to address these issues in the abstract today, is I
7 think they're more appropriately addressed once counsel's had
8 an opportunity to evaluate the case as a whole and decide
9 which defenses to pursue and which not to pursue before they
10 make the onerous decision as to waive privilege.

11 And then we're going to have to decide what the
12 consequential waiver of privilege -- what the scope and the
13 bounds of that are and then we'll take a look to see what
14 documents might fit within those bounds and which witnesses
15 might be impacted.

16 I personally would assume that we're probably talking
17 about a few decision makers who are involved and a handful of
18 attorneys who are involved so I don't share the view that
19 necessarily this is going to require widespread reopening of
20 discovery and a lot of duplicative effort.

21 THE COURT: Because I take it, Mr. Roda, you wouldn't
22 be deposing the lawyers unless there's advise of counsel
23 defense.

24 MR. RODA: That's correct, if they've invoked
25 attorney client privilege, which one has to assume that they

1 would.

2 THE COURT: Sure, sure. So, in other words, it
3 wouldn't be -- I guess what I'm saying is you wouldn't be
4 duplicating the deposition of lawyers, you wouldn't have had
5 their depositions anyway and you'd be taking them on the
6 advice of counsel issue.

7 MR. RODA: Right. But we would be duplicating the
8 non-lawyers --

9 THE COURT: Sure --

10 MR. RODA: -- whom we had deposed.

11 THE COURT: Sure.

12 MR. RODA: And if I might address a couple of points,
13 Your Honor, this case has been pending for a year in this
14 Court. It strikes me as surprising to hear that -- well, it's
15 been pending for a year, this is not a novel issue. As I say,
16 GSK is in the Wellbutrin SR case, the principal defendant,
17 that motion in limine is now before the Court and has been for
18 eight months.

19 In other cases, this type of issue has been
20 percolating because it's inherent in the nature of a sham
21 litigation case. So it -- it's very surprising to hear that
22 there has been no consideration given to this issue by the
23 defendants yet as to what they're going to do.

24 And when they say let's wait and see how this plays
25 out or what the consequences are, I suggest what that means is

1 let's wait and see what the plaintiffs get if we invoke
2 privilege, how strong their case is at that point, and we'll
3 weigh then strategically in the chess game, will we invoke the
4 privilege or not. It's not a matter of let's see how it plays
5 out as to what information we the defendants learn as we go
6 along in this case.

7 They know it. They could convene a meeting of a
8 handful of people -- Mr. Stadnick just referred to at his
9 defendant or the handful at Biovail and say okay, what went
10 down, what -- who made the decision, what was it based on.
11 There may be lots of documents but we know that is because
12 there are -- these documents are sent to all members of the
13 team. But when you distill the story, you distill the
14 decision, that's something that won't take them months to do.

15 Six weeks for before the end of discovery would be
16 after class certification has been -- we would have taken so
17 much discovery at that point and risked duplication for so
18 much that -- and it's unnecessary under the facts. The
19 hypotheticals that they are posing don't really hold true when
20 we stop and think about what we're talking about here.

21 THE COURT: Okay, all right. Well, let's do this.
22 Let's leave this for the moment. It may be that I want to
23 convene another discussion of this issue at some point when
24 after perhaps these decisions are made with respect to these
25 privileged documents -- when I say privileged documents I mean

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1 the -- you know, the confidential documents -- the Anchen and
2 the IMPAX and the like.

3 But I think six weeks before the end of discovery,
4 especially if I use your schedule which is pretty far in
5 advance, Mr. Royall, I don't see how we do that. On the other
6 hand, I don't know enough yet. I mean, Mr. Stadnick has said
7 well, the duplication -- there's only a few decision makers.

8 Maybe what we need to do is flesh this out a little
9 more and then -- you know, the defendants tell me, just -- you
10 can even do it by letter and all, tell me -- that may make
11 sense actually -- tell me when you think you can tell me how
12 much time you need and why, with more specifics than we
13 haven't seen the documents, it won't be that duplicative and
14 we're talking sort of round about here.

15 We don't really have concrete facts. So during the
16 rest of this conference think about that and, Mr. Royall and
17 Mr. Stadnick, think about whether at the end of this
18 conference you can tell me when you can send me a letter
19 explaining to me how much time you need and why you need it
20 and how much duplication or not you think would result -- you
21 know.

22 And again, you don't have to tell me how many
23 depositions but generally, it would be five, it would be 25 --
24 I don't know. If it's 25, that's a lot of people. If it's
25 five, maybe it's not so many. All right, so let's continue

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1 going on for a while here. I do need to leave at 12:15,
2 although that gives us plenty of time but I don't want to
3 shortchange any issue at the end.

4 Now, these categorical privilege logs, which is
5 Biovail's proposal and the plaintiffs of course understandably
6 would like to have the specific -- the specific documents
7 listed. Where are we on that? Have you been able to work
8 something out? Have you continued to discuss that, what makes
9 sense in terms of this? Mr. Royall, do you want to speak to
10 that?

11 MR. ROYALL: Well, if I'm not mistaken, there may
12 have been discussions and I'm not aware, but I think that the
13 report does give you the statements of the discussions. I
14 don't know if there's been any further progress in reaching
15 any kind of agreement. We just laid out our positions
16 anticipating that --

17 THE COURT: Okay.

18 MR. ROYALL: -- that we would --

19 THE COURT: No, that's fine.

20 MR. ROYALL: -- we would speak with you about this.

21 THE COURT: Sure.

22 MR. ROYALL: I don't know that -- I don't know that
23 this is an issue that necessarily needs to be resolved today
24 but we did want to preview it for you and our thoughts on
25 this. Because this is a litigation that does relate to other

1 litigations in which there were, as Ms. Tessar said, four
2 years of litigation in which there were obviously many, many
3 privileged communications that were created, the burden of
4 creating an itemized privilege log here would be something
5 that would be very, very difficult for the parties --

6 THE COURT: It does sound -- it does sound very
7 burdensome. Who's going to respond to this? Are you on
8 discovery, Mr. Sobol?

9 MR. SOBOL: Yes, Your Honor.

10 THE COURT: Can we do something that solves the
11 plaintiff's concerns? I understand the plaintiffs say gee, we
12 need a chance to challenge the privileged nature of a document
13 -- you know, we get the right to say, Judge, they listed it as
14 privileged but we don't think it's privileged -- that's your
15 concern, right? You want to be able to make those kinds of
16 arguments and you're concerned that if it's a category by
17 category -- you know, you won't be able to, right, Mr. Sobol?

18 MR. SOBOL: That's correct, Your Honor.

19 THE COURT: Okay.

20 MR. SOBOL: So --

21 THE COURT: Yes, go ahead.

22 MR. SOBOL: -- So trying to figure out what would be
23 a sensible accommodation between both parties, and also
24 recognizing that frankly none of the plaintiffs have any
25 interest in seeing a 20,000 page privilege log that lists

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1 draft after draft after draft of a motion here or there or
2 whatever where -- which would not be relevant to anybody's
3 purposes, we came up with the following potential solution.
4 The first is that we think that there ought to be drawn a
5 pretty sharp line between documents created before the lawsuit
6 or citizen petition is filed and after.

7 And the reason for that is that the pre-suit or pre-
8 citizen petition documents clearly are going to be of a lesser
9 scale in terms of their number and are also going to go
10 directly to the issue as to objective and subjective
11 reasonableness, if you will, of the matter.

12 And so we think that that pre-suit or pre-citizen
13 petition documents for each of these should be -- you know,
14 individually marked and designated on a log. That's one
15 cutoff. The second then is for post-suit documents, we're
16 simply interested in -- not in routine day to day documents
17 that are passing between -- you know, the lawyers and the non-
18 lawyers at the two institutions that will be drafts of
19 documents or transmittals of things that are happening in
20 Court.

21 But instead, documents that are discussing whether to
22 maintain or to settle the litigation or to evaluate the
23 litigation at a sort of -- in a summary fashion, provide a
24 overall status report, if you will. You can imagine -- and I
25 know I'm sort of drafting here on the fly and I don't mean to

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1 do that too much, Your Honor, but I think we all recognize
2 that during the course of one litigation or four litigations
3 or a citizen petition, there will be much by way of routine
4 correspondence, emails -- what have you.

5 But every once in a while there might be here's your
6 quarterly report, here's where we are at, right, or something
7 else of that nature -- an evaluation, a status report,
8 something that's discussing, maintaining or settling the
9 litigation, something that's directing how to address an
10 SECONDARY filing regarding the status of the case.

11 Identify those by individual designation and then
12 give us the broad categories as the balance. That should, we
13 think, at least a priori it seems to us, address the bulk of
14 the effort that would be --

15 THE COURT: Okay.

16 MR. SOBOL: -- not towards any good effort.

17 THE COURT: All right. Let's get Mr. --

18 MR. SOBOL: Everybody reserving their rights, of
19 course.

20 THE COURT: No, I understand. Let me get Mr.
21 Royall's thoughts on that.

22 MR. ROYALL: Well, could I ask Your Honor --

23 THE COURT: Sure.

24 MR. ROYALL: -- did I mishear Mr. Sobol? Were there
25 four items? Were there more items to your proposal, Mr.

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1 Sobol, or were those --

2 MR. SOBOL: No, I think that was it.

3 MR. ROYALL: Okay, I just wanted to make sure I
4 understood.

5 MR. SOBOL: I might think of another one while I'm
6 sitting here.

7 MR. ROYALL: Okay. Your Honor, these are helpful
8 ideas, I think for us to consider. This is the first that
9 we've heard of them and it may be that it was just this
10 morning when plaintiff's counsel was able to get together and
11 confer that they came up with these ideas so I think that this
12 is a productive -- this opens a productive opportunity for
13 discussion.

14 What I would propose is rather than trying here on
15 the spot to respond to these things that we set up a time soon
16 to confer with plaintiff's counsel to see if we can reach some
17 kind of agreement on this, and if not, to advise Your Honor
18 where we stand.

19 THE COURT: Sure, sure, and then you can -- yes, and
20 if you can't agree -- you know, send me letters in telling me
21 where you are -- you know, in other words, this is as you say
22 a start, and again, Mr. Sobol isn't aware of what the numbers
23 are. You know, it may be that this isn't good enough because
24 the numbers are voluminous even before that but think about it
25 because I do think some sort of categorization makes sense.

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1 On the other hand, I understand Mr. Sobol's situation
2 that he wants to be able to challenge some of these as not
3 being privileged. Okay, all right, and so I leave it up to
4 you all. I mean, if either side believes it's not moving
5 quickly enough, just drop me a note but I don't think that
6 will happen. So before you leave here, why don't you see if
7 you can come to some agreement as to when to meet to discuss
8 that issue.

9 MR. ROYALL: Yes, Your Honor.

10 THE COURT: You can all even stay here if you'd like
11 when I go off the bench.

12 MR. ROYALL: Okay. We'll certainly do that -- I'm
13 sure we can find the time to promptly discuss it and --

14 THE COURT: Yes, because you probably need to go back
15 and talk to the people who really know what you've got here,
16 and I assume --

17 MR. ROYALL: Yes.

18 THE COURT: -- Mr. Royall, you don't have it at your
19 fingertips, obviously --

20 MR. ROYALL: I don't.

21 THE COURT: -- how many documents are covered by each
22 of those categories. Okay, very good. All right, that's fine
23 and we'll do that and then age privilege designations and
24 challenges, you've agreed to what you've set out here. That's
25 fine with the Court.

1 Now, the scheduling order -- let me see what else --
2 and what comes after is really pretty much a discussion -- up
3 until page 19 is a discussion of the -- of that schedule. I
4 try to be realistic when I schedule because I have found that
5 even when I think that I'm realistic, things happen and
6 lawyers are always asking me for extensions.

7 I really prefer to start with something that's
8 realistic so that I can feel comfortable at some point saying
9 I don't -- you know, I hear you, but you've already had
10 however much time -- you know, you told me that this was
11 realistic. So unless it's obviously a medical emergency or
12 something or if there's a little something that has to occur
13 after the dates, of course we're not talking about that.

14 But I really would like to come to a schedule that
15 you all know is realistic, and I don't know that I want to put
16 in there no extensions will be given but -- I mean, that's
17 sort of -- I would like you to assume that.

18 So having said that, Mr. Roda, Mr. Sobol -- I don't
19 know who I'm -- I mean, my tendency will be to go with -- I
20 don't know specifically on every single date but the defense
21 as opposed to -- it seems that the dates that the plaintiffs
22 have given me -- I mean, no matter how much you think you can
23 do it -- then even the plaintiffs think they can do it then,
24 it seems awfully short to me.

25 I mean, I just -- life as it is, I just don't think

1 they're realistic -- the plaintiff's dates. So having said
2 that, Mr. Sobol -- I didn't mean to cut you off but I really
3 do think that I'd like to get something realistic here. We
4 don't even yet have all these underlying documents decided,
5 whether they're going to be produced. I don't know how
6 difficult it's going to be to get them.

7 So anyhow but, Mr. Sobol, I'll certainly hear from
8 you as to what -- you know, what your thoughts are on this,
9 knowing that I think your dates are just a little too
10 aggressive.

11 MR. SOBOL: Sure. Obviously when it comes to
12 schedules the discretion of the Court is almost completely
13 unfettered and how it is that you manage your own docket and
14 how it is that the course the litigation goes is really going
15 to be up to you. We recognize that.

16 And I'm also going to share with you two observations
17 that you probably know about already anyway, but it's at least
18 been in my modest experience, there's nothing that gets the
19 parties focused other than a trial date, no matter what kind
20 of case it is and with that trial date, the realisticness of
21 that trial date.

22 And the only thing that has to be realistic about the
23 trial date is whether or not the Court's going to insist that
24 the parties go forward by that date. The other thing that I
25 would suggest is whatever is realistic is only a matter --

1 it's in the eye of the beholder. In other words, you could
2 set this case for trial January of next year, 2010. That
3 could be theoretically realistic in the sense that you could
4 do this -- run this case like a bankruptcy case --

5 THE COURT: I understand, Mr. Sobol --

6 MR. SOBOL: -- and I'm not suggesting we've done
7 that.

8 THE COURT: -- believe me. I was a lawyer --

9 MR. SOBOL: Right.

10 THE COURT: -- and I had some Judges who did four
11 months --

12 MR. SOBOL: Right.

13 THE COURT: -- anti-trusts, securities --

14 MR. SOBOL: Exactly.

15 THE COURT: -- car accident -- whatever it is, it's
16 four months --

17 MR. SOBOL: Exactly.

18 THE COURT: -- and I've done it --

19 MR. SOBOL: Right.

20 THE COURT: -- and I've been in depositions for 30
21 days straight.

22 MR. SOBOL: Right.

23 THE COURT: So I don't do that.

24 MR. SOBOL: So but --

25 THE COURT: I mean, I don't do that with a car

1 accident case so I'm sure not going to do that here.

2 MR. SOBOL: Right.

3 THE COURT: And you're going -- you would ask me not
4 to and I would -- believe me, I've had them. Plaintiffs have
5 said we want four months or five months, I've given them eight
6 and they come back and they want nine or ten.

7 MR. SOBOL: Right.

8 THE COURT: I mean, it's life as it is and I'm a
9 pushover so I don't -- if I feel that I've given you plenty of
10 time, then I feel that I can say no --

11 MR. SOBOL: Right.

12 THE COURT: -- okay? But I'm just not going to do
13 that.

14 MR. SOBOL: Sure.

15 THE COURT: I'm not going to say to lawyers I don't
16 care that this or that terrible thing happened, you're going
17 to trial in January of 2010.

18 MR. SOBOL: Right.

19 THE COURT: And I also take time to decide things
20 obviously, but I do -- it's important for me to try at least
21 to get it as right as I can and obviously people can disagree
22 with it so I'm not going to -- I mean, I don't know how much
23 the class cert issue, for example, will be in dispute. I
24 don't know.

25 I haven't done an anti-trust class action

1 certification decision in a long, long time. I don't know if
2 I've done one as a Judge, and certainly not after Hydrogen
3 Peroxide. So I'm going to want to really spend time on it so
4 to think of a trial in January, 2010 would be ridiculous --
5 you know, it would be silly.

6 MR. SOBOL: But my point though, where I'm going --

7 THE COURT: Yes.

8 MR. SOBOL: -- because I know that that's not where
9 the Court would want to go, I'd also say that I've run into
10 Judges like that too and what we have said basically is it's
11 like a shoe salesman only he only has a shoe of one size and
12 everybody has to fit into that one shoe. My point here though
13 is this.

14 Whatever date we have set for a trial and that is set
15 forth here, recognizing that the Court is already leaning
16 toward the defendant's side, is that what the plaintiffs would
17 ask is two thing -- first that the Court see that those --
18 whatever dates you're now setting out -- as being truly firm
19 dates which only under extraordinary circumstances ought to be
20 changed. That's easy --

21 THE COURT: I thought that's what I -- isn't that
22 what I just said?

23 MR. SOBOL: Yes, it is. That's the easy one.

24 THE COURT: Okay.

25 MR. SOBOL: But then the second one is a little bit

1 more nuanced and is this. What happens between now and those
2 dates, it makes sense for the parties and the Court to make
3 sure that we're on top of the dates. What I would suggest is
4 that we have either a monthly or a bimonthly status conference
5 to know that we are moving forward in a timely way. I'll give
6 you an example.

7 For good reasons, this status conference was first
8 going to be held I think back in March or April or something
9 like that -- okay? One person's schedule can't accommodated
10 and then something happens with the June date, now we're here
11 in August. The reality is we've lost a season -- a full
12 season, accomplished little in the litigation.

13 I would say that's not anything against the
14 plaintiffs or the defendants, it's just the reality of the
15 situation, and the case has not moved forward. So what I
16 would be asking for is if we could have a monthly or a status
17 conference every other month, right, but that we know as we're
18 moving forward, that these dates have to be met.

19 And therefore, parties will have to produce their
20 documents, they will have to produce their witnesses, they
21 have to move forward because we're basically, as you have
22 said, and I respect that obviously, we're not going to be
23 changing these dates except for very extraordinary
24 circumstances.

25 So it's -- it's keeping the task at mind that we're

1 going to be realistic with this --

2 THE COURT: Okay, well I don't know if we need to
3 have monthly meetings. I've done that in MDLs. I don't know
4 if I need to do that in an anti-trust case, to bring you all
5 in. I mean, you're -- you know, I've got two sets of lawyers
6 and I've got one set of lawyers in a way here and you'll all
7 be working together. I don't know if it makes sense. If both
8 sides want me to do a monthly, I'll do my best to do it, it's
9 just that if I'm in trial -- you know, I'll probably cancel
10 it.

11 But on the date, was there -- I didn't remember
12 getting a dispute about a date. I know there were movements
13 on dates but I thought whoever needed a movement, the other
14 side agreed. I mean, if somebody wants to do something and
15 one side disagrees, let me know.

16 MR. SOBOL: I think there --

17 THE COURT: You know, maybe I decided something and
18 there was a disagreement but I don't remember.

19 MR. SOBOL: There was a communication between counsel
20 where I had indicated it's fine to move it so long as we're
21 doing it the next week.

22 THE COURT: Oh, I see.

23 MR. SOBOL: And then the next thing we knew, it had
24 been postponed two months and we couldn't unwind it.

25 THE COURT: Okay.

1 MR. SOBOL: Now, that's not -- again, I'm not trying
2 to cast -- you know, say anything negative, I just --

3 THE COURT: No, well you should write me a letter
4 saying can we do it sooner. I mean, I'd rather have that than
5 have a monthly meeting.

6 MR. SOBOL: Right.

7 THE COURT: If there's an issue just because it's --
8 I've been in trial a lot lately and I'm also in Washington a
9 lot working so it might be hard, but if there's an issue, drop
10 me a note and say Judge, can we have it earlier and if I
11 possibly can -- because we can meet at 5:00 on days if I'm in
12 trial --

13 MR. SOBOL: Right. Okay.

14 THE COURT: -- if it's really that urgent --

15 MR. SOBOL: Right.

16 THE COURT: -- to do it. All right --

17 MR. SOBOL: The other thing --

18 THE COURT: -- yes?

19 MR. SOBOL: -- I was just going to say --

20 THE COURT: Yes.

21 MR. SOBOL: -- the defendants have summary judgment
22 being finalized in the middle of 2011, okay?

23 THE COURT: March 11th --

24 MR. SOBOL: Right.

25 THE COURT: -- March 18th.

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1 MR. SOBOL: Okay. That is, in our experience, when
2 people are focused in terms of moving a case forward, an
3 extraordinary amount of time. I would hope that in an anti-
4 trust case like this which is a relatively defined set of
5 facts, it's an area where basically all of the lawyers have
6 been litigating in this area -- it's almost like a cottage
7 industry.

8 We know all the cases off the top of our heads and
9 all the rest of that, we should be able to be moving this case
10 toward a hearing that happens before the middle of 2011 in
11 order to have summary judgment. But again, I know that you
12 have discretion and all the rest of that. We're equally
13 intent on trying to -- whatever dates you set, that we're not
14 going to get moving from them.

15 THE COURT: Okay, fair enough. Mr. Royall?

16 MR. ROYALL: Yes, Your Honor?

17 THE COURT: Your thoughts?

18 MR. ROYALL: Well, just a few thoughts. I had
19 forgotten how much of this is set forth in the report but just
20 so you know the chronology, how we got to the defendant's --
21 yes, the defendant's proposed schedule, we started with a
22 schedule that provided for more time than we thought was
23 reasonable, given we had people study, we have handled
24 ourselves similar cases, in fact, one in which Mr. Sobol was
25 involved where we represented Johnson and Johnson.

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1 But we looked at the schedules of many other cases,
2 and what we started with was a schedule that we thought was
3 reasonable and defensible, given those other -- what happened
4 in those other cases. We then compromised in good faith,
5 hoping to reach agreement with the plaintiffs. Significantly,
6 we reduced the time for fact discovery under our proposal by
7 quite a number of months and compressed the schedule to
8 something that we thought was -- was streamlined but still
9 realistic.

10 And I know it looks like a lot of time to think about
11 summary judgment in March of 2011 but realistically having
12 litigated cases like this, cases not quite as complex as this
13 because they involved only one underlying alleged sham
14 litigation as opposed to four, it takes a lot of time, and
15 we're -- as you've heard today, we're starting not from what
16 the defendants would normally start from in terms of their
17 knowledge of the underlying facts.

18 We still have a lot to learn once we get these
19 confidentiality issues resolved. And so we think that this is
20 -- this is realistic, it's actually more streamlined than most
21 of the schedules and cases. If you looked at Wellbutrin SR,
22 for instance, where fact discovery went for over two years,
23 the number I have in front of me is after extensions it was
24 24.25 months.

25 In the Ditropan XL case, which was the Johnson and

1 Johnson case I mentioned -- you know, that Mr. Sobol and
2 others here I'm sure were also involved in, it was almost 19
3 months for fact discovery and if you look at these cases also,
4 you see that there were repeated extensions to the schedule,
5 and that's what we were hoping to avoid. We're mindful of the
6 statement that we saw on your local rules about not granting
7 extensions except in extreme cases.

8 And so what we came up with was something that we
9 felt that we could in good faith live with. It was not --
10 this is -- this is two modifications closer to a streamlined
11 schedule and not something that we intended to bargain from
12 further.

13 Just commenting on Mr. Sobol's -- Mr. Sobol agrees
14 the issue of a trial date to get counsels' attention, I will
15 tell you this, Your Honor, I looked at all of this on the
16 plane here and even our own proposed schedule gets my
17 attention. There's a lot to do in this case. There's a huge
18 amount of work to be done with experts and further fact
19 discovery.

20 And this -- the deadlines laid out in defendant's
21 schedule very much get my attention and I'm sure in that
22 regard I speak for all defense counsel. This is going to be a
23 lot of work, even living with this schedule, but we understand
24 that we should be -- fully expect that we will have to do that
25 and that we cannot expect that oh well, we'll just get more

1 time later, as has often happened in many of these other
2 cases, but we're not expecting that to happen here.

3 So that's all I have to say about that. I'm happy to
4 answer any questions if you have them about -- about the --

5 THE COURT: Okay.

6 MR. ROYALL: -- precise time periods.

7 THE COURT: All right, thank you very much, Mr.
8 Royall. Let me turn to Mr. Sobol first. Is there any --
9 putting aside how far out some of the dates are, what about
10 the time between dates? Are there any objections to that?
11 And that will give me something to work with.

12 MR. SOBOL: No, I mean, I basically -- it's like an
13 accordion, Your Honor, right? I mean, our accordion is
14 tighter and theirs is a little bit longer but apart from that
15 -- you know, I think that the dates are what the dates are.

16 THE COURT: Okay. Now --

17 MR. SOBOL: And --

18 THE COURT: Go ahead.

19 MR. SOBOL: Well, there are two other issues we
20 should schedule too, the Rule 37 and the declaration of advice
21 of counsel, but we'll deal --

22 THE COURT: Sure --

23 MR. SOBOL: -- I assume that you want to deal with
24 that in a moment.

25 THE COURT: Sure. Oh, no, we'll -- yes, we're going

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1 to go back to that --

2 MR. SOBOL: Okay, fine.

3 THE COURT: -- in just a moment, but let's just look
4 at this list for a bit. So both of you are proposing December
5 14th for the plaintiff's class certification motion and any
6 supporting expert reports, and then, Mr. Royall, you're asking
7 me for three months to -- oh no, excuse me -- yes, for three
8 months to do your opposition, and Mr. Sobol or the plaintiffs
9 are proposing a deadline of January 26th.

10 Talk to me about what you envision happening between
11 now and March. Why do you think you need that much time to
12 oppose the class cert?

13 MR. ROYALL: Well, Your Honor, I believe that my
14 experience in dealing with these cases is it's complicated.
15 Until we see their motion, we don't know precisely what we're
16 dealing with. We'll be working with experts and compiling
17 factual record. We most likely will need to do third party
18 discovery.

19 That's actually something that in terms of getting my
20 attention, that very much has my attention, that we will need
21 to do third party discovery relating to class issues and
22 that's not always easy, it's very time consuming. But putting
23 all of that together and an effective opposition and one that
24 we think will hopefully serve as a helpful record for the
25 Court in resolving these class certification issues, it takes

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1 time.

2 And the three months, we could -- we could pull out
3 and cite for you any number of other schedules in similar
4 cases where at least three months was allowed between the time
5 of the filing of the class motion and the opposition.

6 THE COURT: I know, and believe me, I get requests
7 all the time. You know, if you set it -- I've had cases where
8 the parties have agreed -- they've agreed on a schedule and
9 then before I know it, they want another two months to file
10 their motion and then another three months. Look, it's the
11 reality of what happens.

12 It's not the right way perhaps, but these things sort
13 of always do get extended out so I would like a date that's
14 real. And let me ask you, have you sort of sat together to
15 say look, this is what discovery we want to do -- you know,
16 between now and class cert, whether you call it class
17 discovery or merits discovery -- have you done that sort of
18 thing with each other?

19 MR. SOBOL: Yes, we have, Your Honor.

20 THE COURT: You have -- okay. So --

21 MR. SOBOL: And there's -- there's -- I'm sorry.

22 THE COURT: That's okay. And so what does it look
23 like? in other words, how many depositions are you expecting
24 to take between now and the class briefing and that sort of
25 thing?

1 MR. SOBOL: Well, in terms of the numbers of
2 depositions, we haven't discussed the numbers of depositions.
3 We have on the base of experience and sort of having a notion
4 about the level of the number of decision makers that are
5 involved, the kinds of information that we know that the
6 pharmaceutical companies and particularly this -- one of these
7 companies -- GSK -- keeps by way of impact and damages, we
8 have a sense about what that is, which is why -- and having
9 just done it a bunch of times and also having Courts just look
10 at -- you know, Direct Purchaser anti-trust case, which
11 although factually there might be a lot of information,
12 frankly, it's not a novel area at this point, particularly in
13 the pharmaceutical area, it's pretty well worn.

14 So we've sort of done that and we have a -- we have a
15 sense but the parties haven't committed to numbers on either
16 of those things. It is our view though that this being -- you
17 know, August, and there being the entire fall and then -- you
18 know, December right before we even file our class
19 certification brief, the defendant will be doing all of the
20 things that they need to do between now and even then to
21 prepare its opposition --

22 THE COURT: Well, will --

23 MR. SOBOL: -- the notion that it would need another
24 three months to file the opposition is --

25 THE COURT: Will these -- well, whatever the

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1 documents are for the underlying cases that will be dealt with
2 in the Rule 37 motion, they're not needed for class cert, I
3 take it?

4 MR. SOBOL: By and large, no, they're not. I mean,
5 the issues that are relevant in class certification first from
6 the plaintiff's point of view are proving -- you know, that
7 the defendants estimated how quickly a generic would get to
8 market, what that would do to price, how prevalent the generic
9 would be sucked up in the market -- that's one thing we deal
10 with, right?

11 And then the other issue is -- you know, how the
12 wholesalers tend to -- you know, be relatively the same,
13 that's an issue that the defendants try to raise. Those
14 aren't terribly necessary in order to get into the underlying
15 liability issue of a sham or not because frankly, in an anti-
16 trust case, although you have to look at the issue to be sure,
17 it is often the case that the liability issues are the same
18 for all the class members.

19 You don't really have to get into that. Again, these
20 issues of -- that I've just articulated about -- impact and
21 damages and the similarity among -- amongst wholesalers is
22 something that's been dealt with time and time and time again,
23 that it's almost -- you know, like deja vu for going through
24 the exercise in a case specific manner.

25 THE COURT: Will these -- will whatever the documents

1 are for the underlying cases that will be dealt with in the
2 Rule 37 motion, they're not needed for class certification?

3 MR. SOBOL: By and large, no, they're not. I mean,
4 the issues that are relevant in class certification, first
5 from the plaintiffs' point of view, are proving, you know,
6 that the defendants estimated how quickly a generic would get
7 to market, what that would do to price, how prevalent the
8 generic would be sucked up in the market. That's one thing
9 that we deal with, right.

10 And then the other issue is, you know, how the
11 wholesalers tend to, you know, be relatively the same. That's
12 an issue that the defendants try to raise.

13 Those aren't terribly necessary in order to get into
14 the underlying liability issue of a sham or not, because,
15 frankly, in an antitrust case, although you have to look at
16 the issue to be sure, it is often the case that the liability
17 issues are the same for all the class members. You don't
18 really have to get into that.

19 Again, these issues of -- that I've just articulated
20 about impact and damages and the similarity amongst
21 wholesalers is something that's been dealt with time and time
22 and time again, and that it's almost, you know, like a deja vu
23 for -- going through the exercise in a case specific manner.
24 So --

25 THE COURT: So in terms of depositions, whose

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1 depositions would you be needing for the class issue --

2 MR. SOBOL: So --

3 THE COURT: -- categorically, not specific.

4 MR. SOBOL: -- yeah, sure. From the defendants we
5 take a deposition of some of the marketing people who did
6 estimates regarding what the impact might be of generic
7 erosion. That's typically a large part of what we do. If
8 they have any information regarding what the impact was post,
9 you know, launch of a generic, we'll also look at that issue
10 as well.

11 There's usually a handful of people from each
12 organization that had that kind of relevant information,
13 right, and those documents for us to do, okay. The -- yeah,
14 this is an area where there might be people in each
15 organization that have what's called lifecycle management or
16 evergreening, i.e., that this isn't an effort, sometimes
17 lawful, sometimes not unlawful, to genuinely try to prolong
18 the life of a branded drug, so we might take a few of those
19 people's deposition. But it's a handful, relatively speaking,
20 from each organization that we would take.

21 We would anticipate that the defendants would want to
22 take a handful of depositions, obviously, the depositions of
23 the class plaintiffs, you know, right. But there may be some
24 other people who are in the class, particularly, they try to
25 get upstream -- excuse me -- downstream discovery of -- of

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1 financial information, again, pretty routine stuff.

2 And then we take depositions of experts, so each side
3 has at least one expert, maybe we have a couple of experts
4 each that will testify about how the class is relatively
5 uniform, there was relatively uniform impact, you can model
6 them on a classified basis. Each side takes their experts'
7 deposition and that's roughly what we anticipate.

8 THE COURT: Okay. Mr. Royall.

9 MR. ROYALL: Well, Your Honor, just -- just to be
10 clear, we -- I don't believe that we have spoken with -- it's
11 helpful to hear this today, but I don't think we have spoken
12 with plaintiffs' counsel about specific discovery, what both
13 sides plan to do on -- on class cert.

14 THE COURT: But let me ask you, Mr. Sobol, why not?
15 Why didn't you -- I mean, have they not met -- agreed to meet
16 with you? I mean, you -- you want to get this moving. Why
17 haven't you all met before now?

18 MR. SOBOL: Well, I mean --

19 THE COURT: If you tell me Mr. Royall refused, I'm
20 going to --

21 MR. SOBOL: -- I'm not trying to disagree with Mr.
22 Royall, but I think in the context of the schedule --

23 THE COURT: Yes.

24 MR. SOBOL: -- we certainly -- everybody has
25 discussed what it is that they expect the level of work to be

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1 and how much time to do it. And maybe another reason why we
2 haven't discussed it is, you know, it's -- it's self-evident.
3 Again, I don't mean to, you know, beat the dead horse, but
4 this has been done in so many other cases with this
5 defendant --

6 THE COURT: No, but, I mean, are there -- you could
7 be coming up with schedules, for example, or telling them the
8 people you want to -- so you're not -- you haven't started yet
9 saying, these are the marketing-type people we want. And then
10 Mr. Royall is saying --

11 MR. SOBOL: No.

12 THE COURT: -- well, here they are, I mean, these are
13 the ones by specific name, and let's take them in September,
14 October, their depositions.

15 MR. SOBOL: Right. Well, what we tried to do, at the
16 beginning of the -- months ago, I mean, four or five months
17 ago, for us to be able to figure out who those people are --

18 THE COURT: Right.

19 MR. SOBOL: -- we gave the defendants a list of what
20 we thought their initial production should be, which is what
21 we've done in many other cases, so we could learn who those
22 people were, right, and so we gave them a list. And we said,
23 give us -- as has happened in many other cases -- just give us
24 the documents from the underlying litigation, right, give us
25 the names of the -- of the people who made the decisions here.

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1 I'm trying to go to where our initial disclosures were.

2 THE COURT: No, I did read that listing of the
3 documents, yeah.

4 MR. SOBOL: But -- and that would have enabled us
5 then to be able to say, all right, here are the kinds of
6 people we're going to need to depose, right, and I'll give you
7 an example here. Hold on a moment, please.

8 (Pause in proceedings.)

9 MR. SOBOL: You know, there's -- basically, we had
10 outlined the basic documents from the underlying litigation,
11 right, that would enable us to do that, and we were told that
12 they would not be willing to give that information to us on an
13 initial basis, right.

14 THE COURT: Okay. Well, that's -- that stuff doesn't
15 go to class cert, so --

16 MR. SOBOL: Well --

17 THE COURT: -- but in any event, it really is -- it's
18 neither here nor there --

19 MR. SOBOL: Right.

20 THE COURT: -- at this point in time. I'm just
21 wondering why, if there is an interest in really moving along,
22 you know, schedule something and sit down and -- and if Mr.
23 Royall and his colleagues won't meet with you, just let me
24 know. But, Mr. Royall, what are your thoughts? So ahead,
25 sir.

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1 MR. ROYALL: Well, Your Honor, we'll be happy --
2 happy to meet with him and talk about this.

3 The one comment, just hearing Mr. Sobol speak, the
4 one thing I thought I would -- I would say, is that plaintiffs
5 in the interest of the class action litigation, not
6 surprisingly, and I don't say this disparagingly, but they
7 view this as all very simple and straightforward, and so it
8 doesn't surprise me to hear Mr. Sobol say, oh, this has been
9 done many times, it's very simple and straightforward.

10 Defendants on the other hand often, with good reason
11 I believe, are working hard to explain to the Court, no, this
12 is not -- not nearly as simple as the plaintiffs would like
13 you to believe in terms of common impact and what have you.
14 And so we have to work really hard to produce evidence to draw
15 out the realities of the way that distributions occurs and the
16 disparate impact that may be -- go to class certification
17 issues and how there are different agreements with different
18 drug wholesalers about how the drugs are sold, and serious
19 questions as to whether drug wholesalers are even injured at
20 all by any alleged delay in generic -- in the timing of
21 generic entry.

22 And those things can be very complicated, and it's
23 usually the defendants that are bearing the burden of trying
24 to dredge up all of that evidence to present to the Court so
25 that we can have what we consider balanced consideration of

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1 class cert, you will undoubtedly hear from us. No, things are
2 not as simple as the plaintiffs are saying. So that's where
3 we're coming from, why we feel that we need -- we need more
4 time.

5 And that evidence -- some of that evidence that we
6 would want to compile would be evidence from the plaintiffs,
7 but much of it would be from third parties, and we've -- we
8 haven't met and conferred on this, and so -- and I know that
9 both sides have objections to each other's discovery, but I
10 did note yesterday in reading it, that there's some pretty
11 broad blanket objections from plaintiffs to our discovery on
12 some of these very sorts of complexities that I'm alluding to,
13 and so we're going to have to work -- work through those
14 objections.

15 But we don't see it as -- as simple -- even under
16 this schedule, we're going to have to work hard to make sure
17 that we get all the evidence and build the record that we need
18 so that -- so that our experts can evaluate and -- and along
19 with our briefs, present all of the issues we think the Court
20 should consider.

21 THE COURT: Okay. Well, what is your thinking on our
22 getting together monthly or every couple of months?

23 MR. ROYALL: We had -- obviously, Your Honor,
24 whatever you prefer, we have no objection. We want to make
25 sure that this -- this is moving forward and that we are --

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1 we're on track to meet the deadlines in your schedule. I
2 don't know that a monthly meeting where we all actually
3 convene in person is necessary.

4 It may be that we can -- we can confer -- we can
5 confer certainly on a monthly basis without the Court and then
6 call to the Court's attention any -- any issues that we think
7 are significant enough to bother you with if there are any.
8 That's the approach that I think may be best, just so we don't
9 unnecessarily use the Court's time or spend unnecessary time
10 traveling to Philadelphia --

11 THE COURT: Well, that's what I --

12 MR. ROYALL: -- and being in the courtroom when we
13 could be out doing the work that needs to be done.

14 THE COURT: Yes. I'm concerned about everybody --
15 yes. Where are you coming from, Mr. Royall? Remind me.

16 MR. ROYALL: I live in Dallas.

17 THE COURT: You're from Dallas. And how about you,
18 Ms. Tessar?

19 MS. TESSAR: I'm from Denver.

20 THE COURT: You're from Denver. And how about over
21 here?

22 MR. DESMARAIS: New York.

23 THE COURT: New York.

24 MR. PARK: Washington, DC, Your Honor.

25 THE COURT: Washington, DC. I know where Mr.

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1 Zemaitis is from. He's from here. And who -- from the other
2 side, I'm so sorry, Mr. Rogers -- no, not --

3 MR. ROGERS: Yes, I'm from here.

4 THE COURT: -- yes, Mr. Rogers, you're from
5 Philadelphia. Okay.

6 MR. SOBOL: If I may, Your Honor --

7 THE COURT: Okay. And then over here, you're all
8 from all over as well. I know where Mr. Roda is from,
9 Lancaster, but how about everybody else? Are you from --

10 MR. SOBOL: Home of the Boston Red Socks, Your Honor.

11 THE COURT: Okay.

12 MR. SOBOL: Just so it's clear, in terms of a monthly
13 status, that can also be by phone.

14 THE COURT: Yes. We do a lot by phone.

15 MR. SOBOL: In my experience, what's been helpful is
16 that -- if the parties three days beforehand --

17 THE COURT: Yes.

18 MR. SOBOL: -- send to the Court a status report and
19 then we just do it by phone, then what you're doing is, you're
20 keeping the Court and the parties on their toes in terms of
21 what the issues are, you're checking in. It doesn't have to
22 be in person, but it's also a way that all the parties and the
23 Court know that we're doing what we can to meet your
24 deadlines.

25 THE COURT: Yes. Maybe -- maybe I'll certainly ask

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1 for monthly reports, and we can try to schedule a -- a
2 telephone call. It's just that there's even so many lawyers
3 that -- believe me, I do this all the time -- and we're
4 constantly getting requests, Judge, it's scheduled for 4:00,
5 can you move to 3:00? Can you move it to 5:00? Somebody has
6 to do this, and I'm -- I try to be -- so none of this is as
7 easy as it sounds like -- as it should be, but we try -- we do
8 the best we can.

9 You try to accommodate everybody, because, you know,
10 life happens in addition to law, right? So people have other
11 issues that they have to deal with sometimes. And the lawyers
12 have them and they call me, and I'm usually prepared to move
13 things. But let's see what we can do.

14 All right, everybody. Well, I will go back and mull
15 over everything you've told me, and I'll get a schedule out as
16 soon as -- I mean, obviously, today or tomorrow so that you'll
17 all know what you're working under at least certainly in the
18 near future.

19 Now, let me see. Are there any other issues that
20 people wanted to bring, the coordination with the indirect
21 purchaser case, obviously, we don't want any duplication of --
22 please, everybody, no duplication. I can't stand the thought
23 of the cost of anything like that. Mr. Royall?

24 MR. ROYALL: That was actually the issue I was going
25 to raise, is I've -- I've been assuming, but I'm not sure -- I

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1 want to make sure that this is the Court's understanding, but
2 that the schedule that the Court establishes here would apply
3 to both the direct and indirect purchaser cases, so we keep
4 the two matters are on the same track.

5 THE COURT: What do you think, Mr. Zohl -- Zylstra?

6 MR. ZYLSTRA: Zylstra.

7 THE COURT: Zylstra.

8 MR. ZYLSTRA: Good morning, Your Honor. Yes, that's
9 -- that's why we're here --

10 THE COURT: Okay.

11 MR. ZYLSTRA: -- to make ourselves available to the
12 Court. We intend to coordinate with our direct purchaser
13 brother and with the defendants.

14 THE COURT: Great. Thank you very much.

15 Mr. Stadnick, did you want to be heard on the timing,
16 because I didn't hear from you?

17 MR. STADNICK: No, Your Honor. I don't have anything
18 to say to amplify Bioavail's positions. We are, you know, in
19 agreement with them. We submitted the schedule jointly, and I
20 --

21 THE COURT: Okay.

22 MR. STADNICK: -- I would agree that given the
23 complexities of the case, it is a realistic schedule.

24 THE COURT: Okay. And let's go then to the Rule 37.
25 When did you all want to file that, Mr. Kohn -- or, Mr. Sobol,

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1 what are you all thinking?

2 MR. SOBOL: 8-10, Your Honor.

3 THE COURT: Excuse me?

4 MR. SOBOL: August 10th.

5 THE COURT: 8-10? Sure. And then the normal time
6 will kick in and when I get that, I'll do the order that I
7 suggested. Okay. And then, you know, the normal time will
8 kick in and I'll tell our friends at those other companies
9 that -- if they want to come in, they need to come in.

10 Okay. And then the declaration from counsel -- I
11 don't know, declaration, but the letter from defense counsel
12 telling me when they think -- or when do you think you can
13 give me a letter on the advice of counsel?

14 MR. ROYALL: We'll -- that is something -- if we
15 could, Your Honor, I have not had a chance since you raised it
16 earlier, to confer with --

17 THE COURT: Sure.

18 MR. ROYALL: -- with Mr. Stadnick. If we could get
19 back to the Court on that issue?

20 THE COURT: Of course. Sure. Why don't you get back
21 to me by the end of the week?

22 MR. ROYALL: That's fine.

23 THE COURT: Okay? As to when you're going to be able
24 to, but let's make it as soon as -- as soon as you can,
25 obviously. You know, I mean, talk to each other, of course.

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1 I'm not going to force you to tell me right this minute, but
2 try to get more realistic than six weeks before the end of
3 fact discovery. Yes?

4 MR. SOBOL: And then --

5 THE COURT: I'm sorry, Mr. Stadnick?

6 MR. STADNICK: I was just going to ask if I could
7 have some clarification exactly what the Court would
8 anticipate in the letter, just so we could meet with --

9 THE COURT: No. I just want to know a date by which
10 you can give me your position with more specificity. In other
11 words, if you tell me now, Judge, we need two weeks, a week,
12 whatever, to say -- to give you a letter that says, Judge, on
13 the advice of counsel, we propose telling the plaintiffs
14 whether or not we will invoke it on this particular date, and
15 let me tell you why we need that much time. Because there
16 are, you know, whatever -- you know, these number of -- oh, I
17 know -- forgive me, I'm already off the topic, but let me get
18 back to it again.

19 We need that much time to make the decision, because
20 there's all these documents we have to review. We really want
21 to do this very methodically. And by the way, Judge, it will
22 not cause duplication because we have now done our research
23 and there's only three decision-makers who might have to be
24 re-deposed, because the lawyers won't be testifying anyway.
25 There's only this many documents. Give me some basis for

Colloquy

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1 thinking that you really need whatever it is you need, if it's
2 six weeks before the end of fact discovery.

3 So that's all I'm asking you, to tell me now when
4 you're going to get me the letter that tells me the more
5 important thing.

6 MR. ROYALL: Okay.

7 MR. STADNICK: Thank you, Your Honor.

8 MR. ROYALL: And I just want to be clear about that.
9 So the letter -- the letter that we'll send you by the end of
10 the week will just be a short letter that says that we --

11 THE COURT: We'll give you the other letter. That's
12 why I thought maybe --

13 MR. ROYALL: -- we'll give you the other letter by a
14 certain time.

15 THE COURT: Right. That's why I was thinking maybe
16 if you could talk to Mr. Stadnick now --

17 MR. ROYALL: Okay.

18 THE COURT: -- for example, you might be able to tell
19 me today when you think you can do that, and then that will
20 give Mr. Sobol comfort so he doesn't have to, you know, say
21 wait a minute, you don't need whatever amount of time.

22 MR. ROYALL: Could we -- I would say in the next
23 three weeks or so we could -- we could confer and get you a
24 letter?

25 THE COURT: Two weeks.

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1 MR. ROYALL: Two weeks?

2 THE COURT: Two weeks from today, how about that?

3 MR. ROYALL: Is two weeks okay?

4 THE COURT: Two weeks from today, and then, of
5 course, you can respond to it, yes.

6 MR. SOBOL: In three business days?

7 THE COURT: Sure, sure.

8 MR. ROYALL: And so that obviates the need for the
9 letter at the end of this week?

10 THE COURT: You don't need any other letter.

11 MR. ROYALL: Okay.

12 THE COURT: I know I talk fast. I'm sorry. I'm from
13 Philadelphia. I'm sorry. I have to slow down. All right.

14 MR. ROYALL: All right. That's fine. Thank you,
15 Your Honor.

16 THE COURT: Mr. Sobol, did you have another issue?

17 MR. SOBOL: No, that was -- we were just making -- I
18 just wanted to make sure we had an opportunity to respond.
19 That's all.

20 THE COURT: Oh, of course, absolutely, absolutely.
21 In fact, I probably give everybody too much time. We always
22 -- everybody responds, I hear from everybody.

23 All right, counsel, anything further we can do this
24 morning -- or this afternoon?

25 MR. SOBOL: I don't believe so.

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1 THE COURT: All right. Thank you very much for
2 coming in, and I'll get the schedule out. Thanks so much. We
3 are adjourned.

4 MR. SOBOL: Thank you, Your Honor.

5 MR. ROYALL: Thank you, Your Honor.

6 (Proceedings concluded at 12:04 p.m.)

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C E R T I F I C A T I O N

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14 We, Diane Gallagher and Lois Vitarelli, Court approved
15 transcribers, certify that the foregoing is a correct
16 transcript from the official electronic sound recording of the
17 proceedings in the above-entitled matter.

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DIANE GALLAGHER

DATE

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LOIS VITARELLI

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